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In the
Supreme Court of the United States

OCTOBER TERM, 1966

No. 514

MANJA T. BRONNER,
PETITIONER,

v.

ARTHUR L. GOLDMAN ET AL.,
RESPONDENTS.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

The petitioner, Manja T. Bronner, respectfully prays that a writ of certiorari issue to review (1) that portion of the judgment of the United States Court of Appeals for the First Circuit in the above-entitled case which denies the petitioner's claims for civil relief against respondents for their participation in a securities transaction of December 14, 1959 and (2) such other portions of the judgment which purport to adjudicate, adverse to the interests of petitioner, (a) her right to an accounting for her securities collateralizing such transaction and (b) her right for the value of

other securities registered in her name, embezzled by a broker, and received by respondents as security for said broker's borrowings with knowledge of the broker's violations of the Securities and Exchange Act.

Opinions Below

The opinion of the Court of Appeals (Appendix A infra, pp. 1a-9a) is not of this date reported. The opinion of the district court (R. 373-385, 395-396) is reported at 236 F. Supp. 713.

Jurisdiction of This Court

The Court of Appeals affirmed the judgment of the district court on May 19, 1966 and a petition for a rehearing, duly filed on June 2, 1966, was denied without opinion on June 10, 1966. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

Reasons for Granting the Writ

1. The opinion of the Circuit Court is in conflict with the letter and spirit of this Court's rulings in the following respects:

A. The ruling of the First Circuit Court of Appeals that the "policy against broker arrangement of otherwise proper loans [as applied to]—anyone who aids and abets [in such] misconduct" can adequately be enforced through Commission action is in conflict with *J. I. Case & Co.* v. *Borak*, 377 U.S. 426, 432, 84 S.Ct. 1555, 1560 (1964), wherein this Court ruled that "Private enforcement—provides a necessary supplement to

Commission action[1] and with *Bell* v. *Hood*, 327 U.S. 678, 66 S.Ct. 773, 777 (1946) wherein it was held that "where federally protected rights have been invaded—courts [should] adjust their remedies so as to grant the necessary relief."

B. The refusal of the First Circuit Court of Appeals to impose liability upon respondents for acts done by another in pursuance of their wrongful recommendation constituted a ruling in conflict with *Pinkerton* v. *U.S.*, 328 U.S. 640, 66 S.Ct. 1180, 1183-84 and *Nye & Nissen* v. *U.S.*, 336 U.S. 613, 69 S.Ct. 766, 770.[2]

C. The refusal of the First Circuit Court of Appeals to rule that respondents' wrongful recommendation to a broker, known by them to be in desperate financial straits, to deal with a client for the mutual self-interest of respondents and said broker, coupled with respondents' failure to disclose to petitioner that they and the broker had a special interest in promoting the transaction, gave rise to civil liability against respondent, is in conflict with this Court's condemnation of "conduct that tempts dishonor", *Securities Exchange Commission* v. *Capital Gains Research Bureau, Inc.*, 375 U.S. 193, 84 S.Ct. 275, 284 (1963) and its ruling that the "highest standards [are to be imposed upon] every facet of the securities industry", *Silver* v. *New York Stock Exchange*, 373 U.S. 341, 83 S.Ct. 1246, 1262 (1962); and the Circuit Court's refusal to permit the petitioner to follow her securities, which she was induced to surrender to respondents as a result of the broker's fraud, is in conflict with *U.S.* v. *Dunn*, 268

[1] This Court's decision, of course, applied to enforcement of the proxy rules. But no reason appears why the same rationale should not be applicable to margin rules.

[2] While it is true that said cases involved criminal liability, it is respectfully submitted that the rationale applies with even greater force to civil proceedings.

U.S. 121, 45 S.Ct. 451, 454 (1925) wherein such procedure was ruled to be proper if the ultimate holder is not innocent.

D. The Circuit Court of Appeals' implicit ruling that it had power to adjudicate the common law issues as to the embezzled securities, in the absence of the exercise of pendent jurisdiction thereover by the district court, was not authorized in light of *United Mine Workers* v. *Gibbs,* 86 S.Ct. 1130, 1139 (1966).

E. The failure of the Circuit Court to rule that the district court had no pendent jurisdiction to adjudicate the common-law claims as to the embezzled securities or for an accounting because substantially different operative facts and elements of proof were involved in said claims than appeared in the "related" federal claims is in conflict with this Court's rulings in *Armstrong Co.* v. *Nu-Enamel Corp.,* 305 U.S. 315, 59 S.Ct. 191, 196 (1938) and *United Mine Workers of America* v. *Gibbs,* 86 S.Ct. 1130, 1138 (1966).[3]

F. The decision of the Circuit Court of Appeals constitutes judicial encroachment upon the power of Congress contrary to the separation of powers declared by the United States Constitution and in conflict with the decisions of this Court in *Day-Brite Lighting Inc.* v. *Missouri,* 342 U.S. 421, 423, 425, 72 S.Ct. 405, 407, 408 (1952); *Ferguson* v. *Skupra,* 372 U.S. 726, 728-30, 83 S.Ct. 1028 (1963); and *Joseph E.*

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[3] The decisions of the Second, Third, Fifth, Eighth and Ninth Circuit Courts of Appeals are also to the contrary. *Musher Foundation* v. *Alba Trading Co.,* 127 F.2d 9, 19 (2 Cir., 1942); *Kleinman* v. *Betty Dain Creations,* 189 F.2d 546, 548 (2 Cir., 1951). *Pearce* v. *Pennsylvania R. Co.,* 162 F.2d 524, 527 (3 Cir., 1946); *Newport Industries* v. *Crosby Naval Stores,* 139 F.2d 611-613 (5 Cir., 1944); *Crabb* v. *Welden Bros.,* 164 F.2d 797, 803 (8 Cir., 1947); *Landstrom* v. *Thorpe,* 189 F.2d 46, 51 (8 Cir., 1951); *Dubie* v. *Rayford Camp & Co.,* 184 F.2d 899, 901 (9 Cir., 1950).

Seagram & Sons, Inc. v. *Hostetter,* 86 S.Ct. 1254, 1262 (1966) in the following respects:

a) The distinction drawn by the First Circuit Court of Appeals as to an illegal arrangement involving non-regulated, as opposed to regulated loans, is contrary to the policy of Congress and its delegatee, the Board of Governors of the Federal Reserve System, which condemned equally the illegal arrangement of regulated and unregulated loans.

b) The denial of civil relief to the petitioner on the ground that respondents "merely" caused another to violate provisions of federal securities legislation is contrary to the Congressional policy as embodied by the "control" sections.

c) The implicit ruling of the Circuit Court that pendent jurisdiction could be predicated upon a federal claim other than such delineated by 28 U.S.C., § 1338(b) was contrary to the Congressional policy which limited the exercise of pendent jurisdiction to those claims referred to in said section.

G. The declaration of conclusions by the courts below, without the support of findings of fact, is in conflict with the mandate of Rule 52 of the Federal Rules of Civil Procedure and the decisions of this Court in *Mayo* v. *Lakeland Highlands Canning Co.,* 309 U.S. 310, 60 S.Ct. 517, 520 (1940) and *Kelley et al* v. *Everglades Drainage District,* 319 U.S. 415, 420, 422, 63 S.Ct. 1141, 1145 (1943).

2. The opinion of the Circuit Court is in conflict with decisions of other Circuit Courts in the following respects:

A. The opinion of the First Circuit Court of Appeals is in conflict with the rulings of the Second and

Fifth Circuit Courts of Appeals which have held that participation in the arranging of a loan in violation of section 7(c) of the Act and Regulation T thereunder gives rise to a private right of action, *Smith* v. *Bear*, 237 F.2d 79, 88 (2 Cir., 1956); *Goldenberg* v. *Bache & Co.*, 270 F.2d 675 (5 Cir., 1959).[4]

B. The failure of the First Circuit Court of Appeals to apply the "control" provisions, Sections 15 of the Securities 1933 Act and 20 of the Act [15 U.S.C. §§ 77(o) and 78(t)],—its holding that "merely" causing another to violate the provisions of federal securities legislation does not give rise to private redress,—is in conflict with the decisions of the Second and Tenth Circuit Courts of Appeals, *Johnson* v. *Securities Exchange Commission*, 198 F.2d 690, 696, 697 (2 Cir., 1952); *Stadia Oil & Uranium Co.* v. *Wheels*, 251 F.2d 269, 276 (10 Cir., 1957).[5]

C. The Circuit Court's refusal to rule that respondents' wrongful recommendation to the broker requires the loss incurred by the petitioner to be imposed upon

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[4] Also note the following district court decisions: *Remar* v. *Clayton Securities Corp.*, 81 F. Supp. 1014, 1016, 1017 (D.C. Mass. 1948); *Appel* v. *Levine et al*, 85 F. Supp. 240 (S.D.N.Y. 1948); *Reader* v. *Hirsch*, 197 F. Supp. 111 (S.D.N.Y. 1961); *Warshow* v. *Hentz & Co.*, 199 F. Supp. 581 (S.D.N.Y. 1961); *Meisel* v. *North Jersey Trust Co. of Ridgewood*, 218 F. Supp. 274 (S.D.N.Y. 1963); *Glickman* v. *Schweickart & Co.*, 242 F. Supp. 670, 672, 673 (S.D.N.Y. 1963); *Friedman* v. *Belgian American Banking Corp.*, CCH Securities Law Reporter ¶91, 521 at p. 94, 944; *Kenvin* v. *Reuben Rose & Co.*, CCH Securities Law Reporter ¶91, 528 at p. 94, 983. See also: 2 Loss Securities Regulations 2d Ed. 1961; pp. 1263-64. Search of counsel has not indicated any decision to the contrary of the foregoing cases. Civil relief has been granted for participation in illegal arranging of loans involving non-regulated lenders; *Warshow* v. *Hentz* (supra); *Meisel* v. *North Jersey Trust Co. of Ridgewood* (supra); *Glickman* v. *Schweickart & Co.* (supra).

[5] See also: *Hawkins* v. *Merrill Lynch, etc.*, 85 F. Supp. 104 (W.D. Ark. 1949); *Gulf Refining Co.* v. *Fox*, 11 F. Supp. 425 (D.C.S.C. W. Va. 1935)

respondents is in conflict with decisions of the Eighth and Tenth Circuit Courts of Appeals' holding that if one of two persons must suffer a loss because of the fraud of the third, the one who facilitated its perpetration, even if innocent, must bear the loss. *James Talcott, Inc.* v. *Associates Discount Corp.*, 302 F.2d 443, 446, 447 (8 Cir., 1962) and *U.S.* v. *First National Bank of Prague, Okl.*, 124 F.2d 484, 488 (10 Cir., 1941).

D. The Circuit Court's implicit ruling that it had power to adjudicate petitioner's rights against respondents as to the embezzled securities, on the merits, without deciding whether a federal claim, upon which relief may have been granted had been alleged, is in conflict with the decision of the Ninth Circuit Court of Appeals in *Johnston* v. *Earle*, 245 F.2d 793, 794 (9 Cir., 1947).

E. The failure of the Circuit Court of Appeals to apply the "collateral-source" rule [5a] constitutes a ruling in conflict with the decisions of the Fourth, Ninth and Tenth Circuit Courts of Appeals and the Circuit Court of Appeals for the District of Columbia; *U.S.* v. *Harne Hayaski*, 288 F.2d 448 (4 Cir., 1961); *Sainsburg* v. *Pennsylvania Greyhound Lines*, 183 F.2d 548, 550 (4 Cir. 1950); *Standard Oil* v. *U.S.*, 153 F.2d 958, 963 (9 Cir., 1946); *Grayson* v. *Williams*, 256 F.2d 61, 65 (10 Cir., 1958); *Hudson* v. *Lazarus*, 95 U.S.C.A. D.C. 16, 217 F.2d 344.

F. The failure of the Circuit Court to rule that the conclusions of the district court relating to the fulfillment of the burden of proof were required to have been predicated on findings of fact constitutes a ruling in conflict with the decision of the Seventh Circuit

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[5a] Rest. of Law, Torts §24, Comment (f); Harper & Jones, The Law of Torts, pp. 1343-44 and note on p. 1350; Sedgwich, Measure of Damages, (9th Ed. 1920) pp. 103, 104.

Court of Appeals, *Kweskin* v. *Finklestein*, 223 F.2d 677, 678, 679 (7 Cir., 1955).

3. Important substantive questions as to the interpretation and application of federal securities legislation and the rules and regulations thereunder are involved; and constitutional questions dealing with the jurisdiction of the federal courts, separation of powers between the judiciary and legislative branches of government and the "due process" clause, as well as procedural questions relating to the burden of proof, the interpretation and application of the Federal Rules of Civil Procedure, are also at issue.

4. The current national inflation would render especially appropriate the first review by this Court of the margin provisions and a determination of the efficacy of private enforcement as a means of effectuating the Congressional policy underlying such provisions. If the decision of the Circuit Court were allowed to stand, the effective enforcement and control of monetary policy in the First Circuit, an area of substantial financial activity, may seriously be prejudiced.

5. The influence of private factors upon stock brokerage houses and their customers has in recent years been a source of great injury to the economy. Loans to brokers have on several occasions put undue pressure on such brokers and have led them to take steps of an improper, illegal and desperate nature. The potential and actual damage to investors resulting from the "control"[6] of brokers, under such circumstances, is antithetical to the Congressional purpose underlying federal securities legislation—the "protection of investors"—and a review of the "control" provisions, for the first time by this Court, would consequently be most appropriate.

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[6] Feb. 11, 1964, Wall Street Journal, Brokers with a Past, p. 1.

Questions Presented

1. Is not a non-bank professional money lender financing stock purchases, who has recommended to a broker that he arrange a loan for a customer in violation of sections 7 and 8 of the Securities Exchange Act (hereinafter called the "Act") and Regulation T promulgated thereunder, subject to civil liability to said customer for the wrongs of the broker committed pursuant to said recommendation by reason of said lender being an aider and abettor to the broker's statutory violations, a "controlling" person or one subject, directly or indirectly, to the margin provisions?

Subsidiary Questions:

(a) Should not the holding of *J. I. Case & Co.* v. *Borak*, 377 U.S. 426, 84 S.Ct. 1555 (1964), be extended so as to give a private party civil relief for "broker participation" in the arranging of a loan in violation of section 7(c) and 8(c) of the Act and Regulation T promulgated thereunder?

(b) Does not the definition of a "broker", as delineated by section 3(4) of the Act, encompass a factor, whose main business is making loans collateralized by securities, and who in the course of such business (i) liquidates collateral and collects dividends for the mutual interest of himself and his pledgors, (ii) replaces securities belonging to one pledgor for those he has sold to satisfy the obligations of another pledgor and (iii) causes securities belonging to his customers to be registered in the name of lenders to such factor?

(c) Are not the provisions of sec. 7(a) and (d) of the Act self-executing and are they, in the absence

of the Board's exercise of its authority to exempt classes of transactions, applicable to factors?

2. Is not a person, who has recommended to a broker, known by him to be in desperate financial straits, that he deal with a client of said broker for the mutual self-interest of said person and broker and who has not informed said client of the conflict of interest involved, subject to civil liability by reason of said person having engaged in "conduct tempting dishonor" or in conduct contrary to the "highest standards [imposed upon] every facet of the securities industry"?

Subsidiary Questions

(a) Is not the duty to disclose material facts imposed upon such a person, under the premises, by reason of his being a (i) participating seller of securities or (ii) being princeps doli to the broker and investment adviser?

(b) Is the duty to disclose material facts imposed upon such a person irrespective of his awareness of the buyer's ignorance of such material facts?

(c) Is not a person who (i) has recommended another to act in a way contrary to the provisions of the Act and (ii) has caused such other to commit a violation, a "controlling" person under sections 15 of the Securities Act and 20 of the Act, and therefore jointly and severally liable for all acts committed by the other pursuant to the wrongful recommendation and does not the conduct of the former person preclude any defense asserted under the "unless" clause of sections 15 of the Securities Act and 20 of the Act?[7]

[7] This subsidiary question is, of course, equally relevant to the first question posed.

(d) Assuming, respondent's course of conduct was "innocent", is not the common law principle that "when one of two innocent persons must suffer a loss because of the fraud of a third, the one who facilitates its perpetration is the one who must bear the loss" applicable to the case, sub-judice?

3. May a federal court render conclusions without consideration of (a) uncontroverted evidence, not contingent upon credibility; (b) admissions and stipulations of the parties, their counsel and agents; (c) allegations of the complaint and amendments thereto not denied; and do conclusions, including those having reference to the fulfillment of the burden of proof imposed upon the parties, that are not predicated upon findings of facts, have any validity in law?

4. Was it proper for the Circuit Court to affirm on the merits, the judgment of a district court where the district court did not adjudicate necessary issues of ultimate fact and where neither court determined whether federal jurisdiction over the subject-matter existed, or a federal claim, upon which relief may be granted, had, in fact, been alleged?[8]

5. Is not the scope of pendent jurisdiction announced by this Court in *Hurn* v. *Oursler*, 289 U.S. 238, 53 S.Ct. 586, restricted to (a) the subject matter under review by this Court in said case and limited by 28 U.S.C. § 1338(b); (b) to cases wherein jurisdiction over the subject matter, as opposed to mere jurisdiction to determine said jurisdiction, is had; (c) to non-federal actions involving substantially the same operative facts and elements of proof as involved in the "related" federal action; and (d) to non-federal actions "related" to federal claims only of an

[8] Reference, hereinabove, is made to respondents' liability for their appropriation of petitioner's securities that collateralized the broker's borrowings.

equitable nature; and (e) did the district court exercise its discretionary power to entertain pendent jurisdiction as to the embezzled securities and in the absence of such exercise was it proper for the Circuit Court to adjudicate the question of "payment"?

6. Was it proper for the Circuit Court to have adjudicated the issue of "payment" adversely to petitioner on the ground that petitioner has not proved that she had not been reimbursed where (a) such issue constituted an affirmative defense, (b) was not pleaded by respondents and (c) the source of funds was derived from a party not in privity to respondents, (d) the "payment" was gratuitously made and included an assignment of all rights against respondents including those that had been assigned to the payor by the petitioner and (e) the final written terms of the agreement to make "payment" made no specific allocations other than the assignments of rights against respondents?

Statutes, Rules and Regulations

The applicable law is set forth infra in Appendix B, pages 1b to 15b.

Statement of the Case

Respondents, the partners of Roberts & Co. (hereinafter referred to as "R. & Co.") are in the business of financing stock purchases (R. 71, 72, 94). Thus engaged, respondents were "concerned about margin at all times" (R. 97) and consequently closely followed the market prices of securities they held as collateral. The operation of the business inherently requires "relationships with brokers. You cannot lend money on stock as security without having constant contact with the broker. He is an integral part of the situation." (R. 94). In addition, stock brokers constitute a substantial source of business to R. & Co. (R. 50, par. 27). As customers of R. & Co., they became, on occasion, obligated to repay "large sum(s)" (Opinion, page 2) at

interest rates in excess of twelve per cent per annum (R. 170). And stock brokers also solicited business in behalf of R. & Co. (R. 53, par. A).

The loans extended by R. & Co., and those in particular, which were extended to the petitioner's broker (hereinafter referred to as "Homsey"), and petitioner, were for amounts in excess of the maximum permissible under Regulation T (R. 364, 139, 140). The securities collateralizing loans made to its various customers are not segregated by R. & Co. (R. 50, 135, 136) and consequently the securities of one customer are frequently liquidated to satisfy the obligations of another (R. 157, 162) and securities are rehypothecated en masse (R. 136). As a further result of said practice, respondents are often required to make "internal replacements" and said replacements do not occur simultaneous to the sale of the securities (R. 161-166). In addition, respondents also cause securities of their customers to be registered in the name of R. & Co.'s lenders (R. 169). Liquidations are frequent (R. 128) and the use of a facility of a national securities exchange is utilized therefor (R. 396).

Homsey was the petitioner's "customer's man,—her trusted friend and investment adviser" (Opinion, p. 2). He was the senior, managing partner of the stock brokerage firm of duPont Homsey & Co., and a member of the New York Stock Exchange.

The petitioner, prior to the transaction in issue, had bought and sold rather extensively through Homsey and in the instant transaction, as well as prior ones, had relied upon Homsey (R. 396, Opinion p. 2).

On November 25, 1959, Homsey purchased 2000 shares of American Motors from his firm. That purchase for $181,691.00 was knowingly financed by R. & Co. (R. 42) and the firm of duPont Homsey & Co. guaranteed in writing Homsey's obligation to repay the obligation incurred including

a $1634.71 interest charge, as well as delivery of said 2000 shares as collateral. But no collateral was delivered at all at the time of the transaction and Homsey was only able to deliver half of the agreed collateral subsequently. The market price of the shares was also dropping. A week later, the obligation was renewed and a demand note evidenced the same. Homsey was not able to deliver the remainder of the collateral; nor was he able to meet the lenders' demand for payment. Having made earlier borrowings from R. & Co., Homsey's obligation to R. & Co. now exceeded $330,000 (Opinion, p. 2) and he was secondarily liable to R. & Co. for at least another $39,000 (R. 53-55) as a guarantor for loans extended by R. & Co. to customers of duPont Homsey & Co. "Concerned about Homsey's ability to repay this large sum, Goldman, the managing partner (of R. & Co.) suggested that Homsey get someone else to take over the recent transaction(the purchase of the 2000 shares of American Motors) *represented* by the $182,000 loan" (emphasis supplied) (Opinion, p. 2). The "client" taking over the "transaction" was also to take-over the obligation (R. 378).

To that end, Homsey turned to the petitioner. On a prior occasion, upon the advice of Homsey and through his arranging, she had purchased securities[9] by borrowing money from a bank. So in the present case, she acquiesced to Homsey's suggestion to buy 2000 shares of American Motors by financing the purchase thereof through a loan secured by her negotiable securities in the value (inclusive of the 2000 shares) of $261,644.61 (R. 48). It was agreed that they would share any trading gain therefrom equally but petitioner was prohibited from selling the American

[9] Not a shred of evidence supports the Circuit Court's observation that such venture was profitable and indeed an examination of public records shows that the American Petrofina stock thus purchased had *never* since exceeded the then market price; see Exh. C, R. 471.

Motors shares for a period of six months. Petitioner was to receive all dividends and Homsey agreed to pay the interest charges and save her harmless from any trading loss (Opinion, pp. 2-3, R. 378-379).

Petitioner was not informed that she was purchasing the shares from Homsey acting as a principal (R. 381); nor was she informed of the existence of any loans from R. & Co. to Homsey (R. 380). A fortiori, she was not aware of Homsey's default upon such obligations and did not know that the guarantee extended was consequently of little value. Unaware that Homsey's own shares were being sold and that he was indebted to R. & Co., petitioner, obviously, did not realize she had been chosen to serve as the victim of the "bail-out" sought to be effected by respondents and that Homsey's advice to her to enter into the transaction was instigated for ulterior reasons.

Homsey made the necessary arrangements for the meeting of the parties which was attended by Goldman, the petitioner and himself at his office on a Monday, December 14, 1959.

Prior thereto, Goldman had found the petitioner to be "acceptable" and prepared the necessary documents for the transaction (R. 46, § 12, § 14, 88).

On that occasion the petitioner borrowed $184,242.34 from R. & Co. giving her note for that amount and agreed to deliver specific securities as collateral, all of which were received by R. & Co. The check, in the presence of Goldman, was endorsed and handed to Homsey in payment for the 2000 shares of American Motors (Opinion, p. 3) making, what was already known by respondents, completely obvious, to wit, that the petitioner was using the funds, $184,242.34, to purchase the 2000 shares. *The then market value of the shares was $164,626.00* (R. 47).

Nothing was said of R. & Co.'s practice of commingling securities, rehypothecating them en masse and for greater

amounts than due on the applicable loans, nor of their practice of liquidating the securities of one customer for the obligation of another—none of which practices were permissible under the terms of the note in spite of its general provision permitting rehypothecation. After the petitioner left the meeting, Homsey turned over the check issued by respondents back to them in repayment of his November borrowing and the extension thereof and the respondents transferred the 1000 shares already received from Homsey's account to that of the petitioner and consistent therewith also entered upon receipt, a few days later, the remaining 1000 shares of American Motors on the petitioner's account.

"Consistent with his verbal promise to do so, Homsey paid R. & Co. $12,820.20 on July 6, 1960 which was credited as interest on the note signed by the plaintiff." (R. 382) But such funds, in fact, belonged to the petitioner as Homsey simultaneous to the issuance of such check, debited petitioner's account (R. 466).

In addition to the "requested additional collateral—received from Homsey" [all of which was owned by the petitioner] found by the district court (R. 382), a block of 2100 and another of 600 shares of American Motors were received as "additional" collateral for the account of the petitioner by respondents (R. 156, R. 368 par. 17, R. 189, par. 41 at R. 38, 39 and 43; also note Ex. 29, R. 438, the written receipt signed by respondent's controller, R. 169). An equivalent 2100 shares "were delivered off the account" (R. 368, par. 17) but no evidence was introduced as to whom such shares were delivered except that such securities were not delivered to the petitioner (R. 195). Nor was any finding thereon made. No evidence was introduced, nor was a finding made as to the respondents' disposition of 50 shares of Jones & Laughlin Steel and 200 shares of Al-

legheny Corp. (R. 25) except that such securities were not received by petitioner (R. 44).

The 2200 shares of American Motors received on December 14, and 15, 1959 and January 6, 1960 (2000 of which represented the "take-over" of the "prior" transaction) became 6600 shares as a result of the February 1, 1960 stock-split. Of the total amount of shares of American Motors received by respondents for the account of petitioner, only 6000 were credited to her upon liquidation (Opinion p. 5).

Homsey had also arranged for other borrowings from R. & Co. for his benefit which were known by respondent to have been made for enabling him to purchase securities in violation of Regulation T (R. 375). Goldman was aware of said violation not only by virtue of his being a lawyer (R. 86), concededly aware of the provisions of Regulation T (R. 45), but also, according to his own testimony, by virtue of Homsey's request to him to keep all loans in "strict confidence" (R. 248) as any disclosure of such activity was said "might compromise his [Homsey's] position—as a member of duPont Homsey and a member of the New York Stock Exchange." [10]

The aforesaid loans were outstanding and unpaid during the year 1959 and a major portion of 1960 (R. 376, 33). Demand for additional collateral was made but Homsey, instead of pledging securities of his own, pledged securities that had been "entrusted" to him by the petitioner (Opinion, p. 6). The securities thus received by respondents were, with the exception of General Instrument certificates, all registered in the petitioner's name and unendorsed. Stock powers signed by the petitioner were also received. The powers were introduced into evidence and

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[10] And such result, undoubtedly, would have ensued with the further consequence that Homsey would never have had the opportunity to defraud customers, such as the petitioner.

indicated that the handwriting, appearing on the body of the forms identifying the certificates involved, was neither that of the petitioner, nor Homsey. No finding was made as to whether the body of his powers were filled in at all at the time of their receipt by R. & Co. but the record clearly shows that Homsey customarily delivered signed powers in blank form and that the respondents made no requirement for powers to identify specific certificates. No ruling was made as to the non-applicability of the Uniform Stock Transfer although under local law said Act applies only to certificates of local corporations. The district court made no findings as to the affirmative defense of "payment". But, the Circuit Court, despite the fact that such defense was neither pleaded by respondents, nor adjudicated by the district court[11] denied petitioner relief *solely* on such ground concluding that "*petitioner* failed utterly to prove" that she had not been paid by another (Opinion, p. 6).

Argument

A. Petitioner Was Entitled to a Review of the Legal Issues by the Circuit Court and Such Right Was Not Effectively Afforded When Established, Conceded and Stipulated Material Facts, Upon Which the Legal Issues Were Predicated, Were Disregarded by Said Court.

The Circuit Court, in determining the legality of the Dec. 14, 1959 transaction, properly assumed that the issue of

[11] Indeed, the district court made no evidentiary or ultimate findings of fact as to the embezzled securities at all other than finding that the loans in question were knowingly extended for the purpose of enabling Homsey to purchase securities. Neither the bare judgment rendered, nor the conclusion that "plaintiff has failed to sustain her burden of proving any wrongdoing toward her" [by R. & Co.] supports any alternate inference.

whether "the lender had taken some advantage of" [petitioner] (Opinion p. 9) was one of material significance[12] and that the determination of such issue required an examination of the prior transaction, out of which the "take-over" transaction arose[13] and, also consideration of the fairness of the terms of the main transaction which, pursuant to respondents' recommendation,[14] the petitioner was fraudulently induced to enter into by her "customer's man" and "her trusted friend and investment adviser", Homsey (Opinion, p. 2).

The observation of the Circuit Court to the contrary notwithstanding, these *were* facts known by the respondents which gave them notice that the "American Motors speculation [*was*] improper [and] a losing venture" (Opinion, p. 4). Respondents knew that Homsey's borrowing, being for the purpose of purchasing securities was illegally arranged by him, in the *Matter of Sutro Bros. & Co.*,[15] 1963, S.E.C. Release #7053, 1961-64 Decs. CCH Securities Law Reporter, ¶76, 913 at pp. 81, 382-384; and being that of a

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[12] *Silver* v. *New York Stock Exchange*, 373 U.S. 341, 83 S. Ct. 1246, 1262 (1962)

[13] "A contract is rendered illegal by a prior illegal contract with which it is connected and out of which it immediately grows—no matter how many times and in how many forms it may be renewed—." 3 Williston on Contracts, §1753; *Blasdell* v. *Fowle*, 120 Mass. 447, 448; *May* v. *Whitback et al*, 11 Mont. 568, 113 P. 2d 332, 336; *Horbach* v. *Coyle et al.*, 2 F. 2d 702, 706, (8 Cir., 1924); *Lynn* v. *Ula Uranium Co., Inc.*, 163 F. Supp. 245, 252 (D.C. Utah, 1958), aff'd 265 F.2d 916 (10 Cir., 1959). Also see, §29(b) of the Act, 15 U.S.C. §78cc(b) declaring void—"Every contract made in violation of any provision of this chapter—, the performance of which *involves*—the *continuance* of any relationship or practice in violation of any provision—" (emphasis supplied). Also note ¶12 at R. 46.

[14] Respondent "Goldman, the managing partner, suggested that Homsey get someone else to take over the recent transaction represented by the $182,000 loan." (Opinion, p. 2); "someone else" had reference to a "client" [R. 378].

[15] It hardly seems likely that the Circuit Court could have concluded that the holding of *Sutro Bros.* was erroneous in light of its own citation of the case with approval.

broker's, was also in violation of § 8(a) of the Act, 15 U.S.C. §78h(a). Moreover, knowing Homsey's acquisition cost to have been $181,961.00 (R. 377) and the value of the shares on December 14, 1959 to have been $164,626.00,[16] they also knew that the speculation was already a "losing venture" for Homsey.

The main transaction, itself, while certainly having *appeared* to the petitioner to have been favorable, as noted by the Court below (Opinion p. 4), was, in fact, a palpable fraud, despite the observation of the Circuit Court to the contrary.

The petitioner's acquisition cost was $184,242.34,—equal to the amount of the note and the check received by her. That cost was substantially in excess of the $164,626.00 *then* market value—hardly making the transaction "very favorable"! Nor was the transaction rendered "extraordinarily favorable" (Opinion, p. 5) by Homsey's seductive bait—the guarantee to hold the petitioner harmless against loss—which guarantee, unknown to the petitioner, had little if any value in light of Homsey's *then* default[17] to respondents!

* * * * *

With respect to the Court's observation as to petitioner's claim for an accounting that "There is simply no persuasive evidence that more than 2,200 shares of American Motors—6,600 after the stock split—were ever delivered to the defendants by or for the plaintiff," (Opinion pp. 5-6)

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[16] Stipulated at R. 47. Respondents, obviously, knew this as they "were concerned about margins at all times" (R. 97) and a calculation of margin necessarily must take market value into account. A controller (R. 83), formerly employed by a brokerage house [R. 178] was employed by respondents to handle collateral.

[17] Homsey had been unable to provide for the agreed-upon collateral to R. & Co., not to mention his obligation to provide additional collateral for the drop in market value of American Motors shares. He was also, of course, unable to pay off the demand note.

the Circuit Court disregarded the testimony of respondents' own controller and the written concessions of respondents' counsel.[18]

* * * * *

With respect to the issue of the New York Stock Exchange's "payment" to the petitioner, the Court completely disregarded the fact that part of such "payment" consisted of a re-assignment to petitioner, of all her rights against respondents (Ex. 32, R. 441). The Court also completely disregarded the conceded fact that "payment" to the petitioner was gratuitously[19] made (R. 43), a fact, in reliance upon which, the petitioner sought the Court to apply the "collateral source" rule."[20]

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[18] "Q. So, in other words, [on] June 3, 1960, you received another 2,100 shares from the plaintiff, did you not, that is, American Motors?

A. That is correct." [R. 156]

"On June 3, 1960, there were 2100 shares of American Motors delivered to Roberts and Co. for the account of the plaintiff." (Par. 17, R. 368).

Q. "In addition to that you testified you received 600 shares of American Motors from the plaintiff on May 20 or 25, 1960, you testified to that today?

A. That is correct." [R. 189]

"Roberts & Co. received [the 600 shares of American Motors] as *additional* collateral for the plaintiff's note." (Par. 41 at R. 38, 39 and 43. Also note Ex. 29, R. 438, the written receipt signed [R. 169] by Heffernan.)

[19] Also see, *Legate* v. *Maloney, Jr.*, Receiver of duPont Homsey, 334 F.2d 704, 708, footnote 6 (1 Cir., 1964) wherein the Circuit Court described the role of the Exchange, as to settlements made with customers, to be that of a "good Samaritan".

[20] See footnote 5a, supra. Also see cases cited in par. E at p. 7.

B. The Circuit Court Misapplied the Law

1. *The Main Transaction*

Administrative agencies, alone, are not adequately equipped[21] to enforce the public interest sought to be protected by the enactment of the margin provisions. Consequently, "Private enforcement [as in the instance of proxy regulations] provides a necessary supplement to Commission action", *J. I. Case and Co.* v. *Borak*;[22] and private actions for the illegal arranging of loans from regulated *and* non-regulated sources have been upheld.[23] Civil relief for respondents' aiding and abetting of the broker's violation of the margin regulation is *not* "impede[s](d)" by reason of the purported non-regulated status of the lender as any arrangement of a loan by a broker for a customer, on terms other than the broker, himself, could legally extend is condemned;[24] and the conduct of the instigator is equally culpable to that of the actor.[25]

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[21] The Commission, itself, has stated that it has refrained from enforcing the provisions of the Act "because various considerations of manpower so required." Loomis and Eisenberg, SEC as Amicus Curae, American Bar Ass. Jour., August, 1966, Vol. 52, #8, p. 749, at p. 753. Cf. Brief filed by Commission in *J.I. Case* v. *Borak*, ubi infra. And the Commission has also taken the position that the "federal securities laws—create rights of action for investors who claim that they are injured by violations of the acts, or by conduct which the act forbids.", ibid, p. 753.

[22] 377 U.S. 426, 432, 84 S. Ct. 1555, 1560. This Court in holding that the Act conferred an implied right to private relief for violation of the proxy regulations stressed the underlying intent of Congress, "the protection of investors." Likewise, Congress recognized that "*protection of the small speculator* by making it impossible for him to spread himself too thin, would be achieved" by the enactment of the margin provisions. House Comm. Rep. 73rd Cong. 2d Sess. No. 1383

[23] See p. 6, and footnote 4, supra.

[24] Reg. T, 12 C.F.R. §220.7

[25] Federal Reserve Bulletin 950 (1953); 2 Loss Securities Regulations, 2d Ed. 1961 p. 1263; *Nye & Nissen* v. *U.S.*, 328 U.S. 640, 66 S. Ct. 1180, 1183-1184; *Riss & Co.* v. *Association of American Railroads*, 170 F. Supp. 354, 370 (reversed on other grounds); also note 62 Stat. 684, 18 U.S.C. §2; 62 Stat. 701, 18 U.S.C. §371.

> "The disregard of the command of a statute is a wrongful act and a tort. As was said in *Texas* v. *Pacific R. Co.* v. *Rigsby,* 241 U.S. 33, 39, 36 S.Ct. 482, 484, 'This is but an application of the maxim, ubi jus ibi remedium'—*The same principle was involved in Remar v. Clayton Securities Corp.,* D.C. Mass., 81 F.Supp. 1014."
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> *Slavin* v. *Germantown Fire Ins. Co.,* 174 F.2d 799, 814 (3 Cir., 1949).

Violation of §7(c) of the Act, as well as violation of other provisions of federal securities legislation, gives rise "to implied rights of action—not contingent upon statutory language which affirmatively indicates that they are intended. On the contrary, they are implied unless the legislation evidences a contrary situation." *Brown* v. *Bullock,* 194 F.Supp. 207, 224 (D.C.S.D.N.Y., 1961), aff'd 294 F.2d 415 (2 Cir., 1961).

> "Moreover, where federally protected rights have been invaded, it has been the rule from the beginning that courts will be alert to adjust their remedies so as to grant the necessary relief."
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> *Bell* v. *Hood,* 327 U.S. 678, 66 S.Ct. 773, 777 (1946).

Respondents, moreover, qua lender of funds collateralized by securities, "engaged in the business of effecting transactions in securities for the account of others" and therefore, being statutory "brokers"[25a] and "creditors" under Regulation T, illegally *extended* funds. Had Congress intended to include within the definition only persons "trading" for the account of others, it would have fashioned the definition accordingly. Liquidations and collection of dividends were "effected" for the benefit of "others" as well as of the benefit of respondents and the

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[25a] See definition of the term "broker", section 3(4) of the Act, 15 U.S.C. §78(c)(4).

replacement of securities "effected" for the benefit of customers, whose securities had been sold to satisfy the debts of other customers, was exclusively for the benefit of "others". And there is no doubt that such acts were "transactions in securities". That such transactions did not constitute respondents' "main" business is insignificant.[26] That Congress felt need to exclude one group of pledgeholders, banks, from the statutory definition strongly suggests that it contemplated the activity of pledgeholders to fall within the ambit of the definition.[27] Moreover, it has been held that any one may be guilty of causing a violation of the margin provisions whether he is a member of a group specified by the regulations or not.[28]

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[26] Federal Reserve Bulletin 961 (1939)

[27] Cf. *Securities & Exchange Commission* v. *Guild Films*, 279 F.2d 485, 489 (2 Cir., 1960); also see James C. Sargeant, Pledges and Foreclosure Rights under the Securities Act of 1933, 45 Va. Law Rev. 885, 895.

[28] "When, as in the case of Regulation U, a Federal Reserve regulation provides that no bank shall extend certain credits, and the regulation omits any prohibition against non-bankers arranging such bank credits, can anyone but a bank be held under §7(c) or (d)? It seems to me that an affirmative answer is required. *The language and intent of §7(c) and (d) are to the effect that one who violates or causes the violation of a regulation is guilty. It would be absurd to interpret such a broad statute so that one who merely causes a violation is not guilty if the particular regulation in issue states merely that such-and-such classes of persons shall not extend credit, and the regulation fails to specify that no one shall arrange such a prohibited credit.*" *Remar* v. *Clayton Securities Corp.*, 81 F. Supp. 1014, 1016 (D.C. Mass., 1948) (emphasis supplied). It should also be noted that Congress, through the enactment of §7(a), intended to reduce "the *aggregate* amount of the nation's credit resources which can be directed by speculation into the stock market [and that the standard inserted in said sub-section was designed to protect] the Board from undue speculative pressure." Committee Report of the House of Representatives, 73rd Congress, 2d Session, p. 8. In addition, it was intended by Congress that the rules and regulations to be prescribed, were to "be adhered to by brokers, dealers, banks, *and all other persons and corporations* who extend and maintain credit for the purpose of purchasing or carrying any security registered on a national securities exchange", Senate Committee Report on June 6, 1934; Committee on Banking and Currency, 73rd Congress, 2d Sess., Report No. 1455, p. 111 (emphasis supplied); also see report of same committee of Febr. 23, 1934, pp. 6309-6389.

The record and the opinions of the courts below leave no doubt that the statutory and common law wrongs, in connection with the sale of the 2000 shares of American Motors to the petitioner, were committed by Homsey[29] pursuant[29a] to respondents' wrongful recommendation. Accordingly, respondents should have been held civilly liable for such wrongs, as well as the violation of the margin regulation committed, on the principle of respondeat superior and basic concepts of equity and restitution,[30] as well as the "control" provisions.[31] As respondents, under *Nye & Nissen* v. *U.S.*, were *criminally* liable even for those wrongs of Homsey as to which they might have had no specific knowledge, the decision of the Court below, denying *civil* relief, is not tenable. Respondents' recommendation for the broker to deal with a client for their self-interest, coupled with knowledge of the broker's desperate financial condition, also constituted an instigation to commit a common law breach of trust and was "conduct tempting dishonor"[32] contrary to the "highest standards [imposed upon] every facet of the securities industry.[33] And re-

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[29] He failed to disclose (a) the raison d'etre of the transaction, (b) that he was acting as a principal, and (c) that his guarantee was worthless. The price charged was almost $20,000 in excess of market value and his obtaining a share of the potential gain was in violation of the Investment Advisers' Act, §7(1); 15 U.S.C. 80b-5.

[29a] "To this end, Homsey turned to the plaintiff." (Opinion, p. 2).

[30] *James Talcott, Inc.* v. *Associates Discount Corp.*, 302 F.2d 443, 446, 447 (8 Cir., 1962); *U.S.* v. *First National Bank of Prague, Okl.*, 124 F.2d 484, 488 (10 Cir., 1941).

[31] Section 15 of the Securities Act, 15 U.S.C. §77(o), section 20 of the Act, 15 U.S.C. §78(t). *Stadia Oil & Uranium Co.* v. *Wheels*, 251 F.2d 269, 276 (10 Cir., 1957); *Johnson* v. *Securities Exchange Commission*, 198 F.2d 690, 696, 697 (2 Cir., 1952); *Hawkins* v. *Merrill, Lynch etc.*, 85 F. Supp. 104, 122, 123 (D.C. Ark. 1949); *Gulf Refining Co.* v. *Fox*, 11 F. Supp. 425 (D.C. W. Va. 1935)

[32] *Securities Exchange Comm.* v. *Capital Gains Research Bureau*, 375 U.S. 193, 84 S. Ct. 275, 284 (1963)

[33] *Silver* v. *New York Stock Exchange*, 373 U.S. 341, 83 S. Ct. 1246, 1262 (1962).

spondents' failure to disclose to the petitioner their interest in unloading their unrealized loss of the November transaction onto the petitioner, compounded the wrongs committed by them.

That respondents may not have known that petitioner was unaware that she was being used as an instrument to achieve a "bail-out", did not, as the Court below implied, relieve respondents of the duty to disclose such material fact.[33a] The Court below apparently confused said duty with a purported lack of intent to conceal. As respondents, in dealing with the petitioner, acted through her fiduciary and thus exploited that fiduciary relationship, they cannot be heard to claim that the transaction was at "arm's length". Their duty to disclose to petitioner, consequently, was coextensive with that of her broker.[34]

Respondents, in any event, did not receive the petitioner's securities as collateral for the note in "good faith" in light of their illegal "broker participation" and consequently petitioner was entitled to follow the securities to respondents, the latter not having been "*innocent* purchasers for value."[35] Said lack of "good faith", as well as respondents' "merely" causing the broker to have violated

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[33a] 3 Loss, Securities Regulations, pp. 1438-39, and footnote 30 therein.

[34] Rest. of Law, IV Torts §875, 876 and 882; *Montgomery Ward & Co.* v. *Northern Pac. Terminal Co. of Oregon*, 128 F. Supp. 475, 503 (D.C. Ore. 1953). But the *restrictive* common law approach to fraud "traditionally—applied in damage suits between parties to arm's length transactions involving land and ordinary chattel [does not apply to securities transactions where an] affirmative duty of 'utmost good faith and full and fair disclosure of all material facts' as well as an affirmative obligation 'to employ reasonable care to avoid misleading' " is imposed upon fiduciaries and persons particeps doli. *S.E.C.* v. *Capital Gains Research Bureau, Inc.*, ibid p. 284.

[35] *U.S.* v. *Dunn*, 268 U.S. 121, 45 S. Ct. 451, 454 (1925); Rest. of Law, Trusts, Vol. II, 2d Ed. §288, §290; Rest. of Law, Restitution, §138(2); Rest. of Law, Contracts, §477. Illegal "broker participation" rendered the contract voidable, if not void, under sec. 29(b)(1) of the Act, 15 USC 78cc(b)(1).

the margin regulations, forbids respondents to disavow the acts of Homsey, section 20 of the Act, 15 U.S.C. § 78(t).

Moreover, the opinion of the Circuit Court leaves no doubt that it concluded that respondents knew that their recommendation to Homsey encompassed a *sale* of the 2000 shares of American Motors as indicated by its willingness to assume that respondents aided and abetted Homsey's violation of the margin provisions.[36] Even the Circuit Court's conclusion that "there was nothing to indicate to the defendants—that an open market purchase would [have been] more advantageous than the acquisition actually made"[37] presupposes that respondents did know that petitioner was *acquiring* the shares. Also the record clearly shows that the 2000 shares were transferred by respondents from the Homsey account to the petitioner's account and counsel for respondents conceded that prior to the hatching of the "bail-out" scheme, respondents had been urging Homsey to *sell* the shares (R. 208). And it has already been shown that the *stipulated* market value was almost $20,000.00 less than the amount, known by respondents, to have been paid for said stock by the petitioner (supra, pp. 12, 15, 20). Consequently, respondents even had *actual* knowledge of facts indicating that Homsey had substantially over-charged the petitioner and said knowledge rendered the transaction of the parties voidable by the peti-

[36] See also, footnote 14, supra.

[37] In the event that neither this conclusion, nor its opposite, is a necessary conclusion, the determination of such issue of course, should have been remanded to the trier of facts. "But it is one thing for a trier of fact to say 'no' and another thing to say that a trier of fact could not say 'yes'." *Rogen* v. *Ilikon Corp.*, 301 F.2d 260, 267 (1 Cir., 1966). And the same procedure applies also to the Circuit Court's conclusion that "there was nothing to indicate to the defendants —that the plaintiff did not fully understand what was being done" (the effecting of a bail-out transaction). That respondents did not inform the petitioner of "what was being done" and that Homsey did not do so at the meeting, if not requiring a conclusion opposite to that of the Circuit, at least, raises a factual issue.

tioner under Sec. 29(b)(2) of the Act, 15 U.S.C. § 78cc(b)(2).[38]

2. *The Accounting*

Neither the district court, nor the Circuit Court concluded upon whom, as between the parties, the burden of proof as to the accounting, was placed under local law. The district court's conclusion that respondents satisfied said burden, if imposed upon them, was not predicated upon findings of facts;[39] and its conclusion that petitioner had not proved that the withdrawals were unauthorized was also[40] not so predicated.

No evidence was offered as to whom respondents delivered the petitioner's 2100 shares of American Motors on June 3, 1960; but Heffernan, respondents' controller in charge of handling collateral,[41] did testify that he had no personal knowledge that said shares were received by the petitioner (R. 195) and it was conceded that 100 shares of Jones Laughlin Steel and 200 shares of Allegheny Corp. were not liquidated, nor returned to the petitioner.[42] Indeed, no findings were made as to the above.

And contrary to the conclusion of the courts below, *more* than 2200 pre-split of 6600 shares of post-split shares of

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[38] Finally, it should be noted that petitioner's allegations as to respondents' participation to Homsey's frauds [R. 36-38] were not denied and must, under Rules 15(a) and 8(d) of the F.R.C.P., be deemed to have been admitted.

[39] It was based on "all the evidence" and on the testimony of Heffernan [R. 396]. But the latter's testimony, apart from stating conclusions, did not give factual support for the conclusion of the district court.

[40] The mandate of Rule 52, F.R.C.P., applies to conclusions as to fulfillment of burden of proof; *Kweskin* v. *Finklestein*, 223 F. 2d 677, 678, 679 (7 Cir., 1955).

[41] R. 73, 81, 84, 108, 171, 177

[42] R. 25, last line; R. 39, 42, and R. 44.

American Motors "were delivered to defendants by or for the plaintiff,"[43] and consequently the deficiency of said shares was in excess of 600.[44] The testimony indicated that Homsey had no authority to receive shares in behalf of petitioner from respondents except as incident to a "sell" order. The basic agreement between Homsey and petitioner conferred no such express or implied authority and was, in any event, voidable.[45] Exhibit 16, likewise, extended no such authority and the absence of any written authorization rendered respondents' assumption as to the broker's authority to have been made at their peril.[46]

The courts below, in any event, had no jurisdiction to adjudicate the claim for an accounting as the issues involved therein, i.e.,—the amount of additional collateral received, and the disposition of collateral by respondents, as well as the question of unauthorized withdrawal,—were substantially different[47] from the issues addressing themselves to the validity of the main transaction and petition-

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[43] See pp. 20, 21, supra. No attempt is made to have this Court substitute its judgment for that of the trier of facts. Error is claimed on the ground that the courts below refused to consider stipulated and conceded facts.

[44] The Circuit Court arrived at this figure by deducting the number of shares sold by respondents for the account of petitioner, 6000, from 6600.

[45] See footnote 29, supra. Moreover, respondents disavowed any knowledge of said agreement and consequently could not have relied thereupon. Nor could respondents have relied on the authority to handle the transaction that "could have been" extended to Homsey which "may" have been discussed in the presence of petitioner [R. 257]. The withdrawals of securities authorized by petitioner, which are not in issue, gave no general right for Homsey to cause withdrawals; nor was any reliance thereon shown by respondents especially in light of the fact that respondents did not know whether the former securities had even been received by petitioner.

[46] Sec. 8(d) of the Act, 15 U.S.C. §78(h)(d) and Rule 8c-1-(f).

[47] Pendent jurisdiction will not lie under such circumstances; *Armstrong Co.* v. *Nu-Enamel Corp.*, 305 U.S. 315, 59 S. Ct. 191, 196 (1938); *United Mine Workers of America* v. *Gibbs*, 86 S. Ct. 1130, 1138 (1966), and cases cited at footnote 3, supra.

er's right to rescind the same. The elements of proof, of course, were also substantially different.[47] And pendent jurisdiction did not exist for the further reason that Congress' delineation of said jurisdiction did not encompass the subject-matter here involved, 28 U.S.C. § 1338(b).[48]

3. *The Embezzled Securities*

The district court made no findings, nor even rendered any conclusions, as to respondents' liability for their appropriation of petitioner's securities embezzled by Homsey, other than finding that respondents' loans to Homsey, which became collateralized by said securities, were extended for the purpose of enabling Homsey to purchase securities.[49] The Circuit Court assumed that liability might have extended to respondents[50] but concluded that petitioner "utterly failed to prove that payment [by the Stock Exchange] did not cover the items now in suit."[51] (Opinion, p. 6)

Petitioner's allegations (R. 35, 36) were not denied;[51a]

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[48] 37 Iowa Law Review, 399, 419 (1952); 100 U. of Penn. Law Review, 585, 587, 588 (1951); cf. *Strachman* v. *Palmer*, 82 F. Supp. 161, 166 (D.C. Mass. 1949).

[49] The identity and value of the securities were stipulated and it was conceded that the securities were embezzled by Homsey. No conclusion was rendered as to whether respondents' knowledge of the illegality of Homsey's borrowing, Sec. 8(a) of the Act, 15 U.S.C. §78(h)(a), and his arranging therefor, sec. 7(c) of the Act, 15 U.S.C. §78(g)(d), *In the Matter of Sutro Bros. & Co.*, 1963, S.E.C., Release #7052, 1961-64 Decs. CCH Securities Law Reporter ¶76, 913 at 81, 382-384, rendered their lien on petitioner's securities invalid and no findings or conclusions as to the negotiability of the certificates involved were rendered.

[50] The Circuit Court's opinion does not state whether federal or local grounds were involved in that assumption.

[51] No authority was cited and counsel believes that none exists for imposing upon a plaintiff the burden of negating the affirmative defense of payment.

[51a] See Rule 8(d) and 15(a) of the Federal Rules of Civil Procedure.

and respondents did not plead the affirmative defense[52] of "payment." Petitioner's objection to the testimony of Mr. Jenckes, pertaining to such alleged defense, accordingly should have been sustained and should not have been extended probative value[53] by the Court below.

The Circuit Court's ruling was also erroneous in that it improperly placed the burden of proof upon petitioner,[53a] that it did not take into account documentary evidence (Ex. 34, R. 441) which clearly indicated that the final settlement had made no allocation[54] and that all claims against respondents had been reassigned to petitioner (Ex. 32, R. 443). The resultant deprivation of the fruits of that reassignment by the Court below was in violation of the "due process" clause of the United States Constitution.

Moreover, the "payment" of the Exchange was gratuitously[55] made (R. 43) and consequently respondents were not entitled to any benefit therefrom.[56]

As it was not determined that petitioner had successfully alleged a federal claim, upon which relief may have been granted, judgment should not have been rendered on the merits of the issue of "payment"; *Johnston* v. *Earle*, 245 F.2d 793, 794 (9 Cir., 1957) and the Circuit Court was not empowered to render a judgment on the merits going

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[52] See Rule 8(c) and 12(h), F.R.C.P.

[53] *Hay* v. *Nance*, 119 F. Supp. 763, 766 (D.C. Alaska, 1954).

[53a] See footnote 51, supra.

[54] Such circumstance, alone, forbids respondents from receiving any benefit from said payment. *Gerdes* v. *Reynolds*, 25 N.Y.S. 2d 622, 644; *Peck* v. *Powell*, 259 S.W. 640, 645; *Consolidated Naval Stores* v. *Wilson*, 82 Fla. 396, 90 S. 461; *Wyandotte Coal & Lime Co.* v. *Wyandotte Paving & C. Co.*, 97 Kans. 203, 154 Pac. 1012.

[55] See footnote 19, supra. Also see the Petition for Writ of Certiorari filed by the New York Stock Exchange in *New York Stock Exchange* v. *Legate* for the October term of 1964 wherein the very same Mr. Jenckes stated in behalf of the Exchange at p. 6 thereof that the commitment of the Exchange was that of a "volunteer."

[56] See cases cited at p. 7, par. E, supra.

to such issue as related to petitioner's common-law claim in light of the district court's refusal[57] to exercise pendent jurisdiction, *United Mine Workers of America* v. *Gibbs*, 86 S.Ct. 1130, 1139 (1966).

Moreover, even if the district court had intended to exercise pendent jurisdiction, it had no such power as the question of the negotiability of the certificates involved substantially different issues and elements of proofs than the "related" federal claim and such exercise would, furthermore, have been contrary to the provisions of 28 U.S.C. § 1338(b). In addition, the absence of any determination by the Court below as to its jurisdiction over the subject matter of the "related" federal claim prohibited an exercise of pendent jurisdiction[58] and the legal, as opposed to the equitable, nature of said federal claim also precluded the exercise of pendent jurisdiction.[59]

Conclusion

In view of the foregoing reasons, arguments and authorities and in light of the importance of the questions involved, it is respectfully submitted, in conclusion, that a writ of certiorari should issue.

Respectfully submitted,

MANJA T. BRONNER,
Pro se.
418 Boylston St.,
Boston, Mass.

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[57] The complete omission of any reference to petitioner's securities collateralizing Homsey's borrowings permits no other interpretation of the court's opinion.

[58] *Musher Foundation* v. *Alba Trading Co.*, 127 F. 2d 9, 10 (2 Cir., 1942); *Bell* v. *Hood*, 71 F. Supp. 813 (D.C.S.D. Calif. 1947), 77 Har. Law Rev. 285, 289 (1964).

[59] *Bell* v. *Hood*, ubi supra, at p. 820.

Appendix A

United States Court of Appeals
For the First Circuit

No. 6583.

MANJA T. BRONNER,
PLAINTIFF, APPELLANT,

v.

ARTHUR L. GOLDMAN ET AL.,
APPELLEES.

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MASSACHUSETTS

Before ALDRICH, *Chief Judge*,
HASTIE* and MCENTEE, *Circuit Judges*.

Peter R. Tritsch for appellant.
Henry M. Leen, with whom *Thomas J. Carens* and *Roche & Leen* were on brief, for appellees.

OPINION OF THE COURT.
May 19, 1966.

HASTIE, *Circuit Judge*. This is a suit by the maker of a $184,000 promissory note against the payee for cancellation of the note and for the value of securities posted as collateral and sold after the note became overdue.

The plaintiff is a business woman, the owner and operator of a substantial ladies' apparel retail business. The defendants are members of Roberts & Co., the payee of the note, a partnership engaged as a factor in the lending of money. The defendant Goldman is the managing partner and personally handled the transactions here in question.

*Sitting by designation.

Another principal in the venture, though not a party here, was Anton Homsey, a broker who was a member of the New York Stock Exchange and the managing general partner of the stock brokerage firm of du Pont Homsey & Co. For several years, before and after the transactions in suit, the plaintiff bought and sold stocks rather extensively through various brokers. In 1958, she became a customer of du Pont Homsey & Co., with Homsey acting as the firm's customer's man for her account. He also became her trusted friend and investment adviser.

Homsey also engaged in the purchase and sale of marketable securities for his own account. In this connection he borrowed sums of money from time to time from Roberts & Co., pledging stock certificates to secure the loans. In November, 1959 Homsey borrowed about $182,000 from Roberts & Co. and undertook to pledge 2,000 shares of American Motors common stock as security. A week later he gave the defendants a demand note for the amount he had borrowed. However, he had pledged only 1,000 shares of stock as collateral.

At the same time, earlier borrowings by Homsey from the defendants also remained unpaid, making his total indebtedness to the firm about $330,000. Concerned about Homsey's ability to repay this large sum, Goldman, the managing partner, suggested that Homsey get someone else to take over the recent transaction represented by the $182,000 loan.

To this end, Homsey turned to the plaintiff. She had traded profitably from time to time in American Motors stock. Moreover, on one occasion she had borrowed money to finance the purchase of stock in a profitable venture in association with Homsey. So, in the present case she acquiesced in Homsey's suggestion that she buy 2,000 shares of American Motors, financing the purchase through a loan secured by negotiable securities. It was agreed that they

would share any trading gains equally, but plaintiff was to receive all dividends on the stock and Homsey agreed to save her harmless from any trading loss.

The transaction was carried out at a meeting of the plaintiff and Homsey with Goldman. On that occasion the plaintiff borrowed $184,000 from Roberts & Co., giving her note for that amount and promising to deliver 2,000 shares of American Motors plus other negotiable securities as collateral. Goldman then delivered to the plaintiff his firm's check for $184,000 which she endorsed to Homsey in payment for 2,000 shares of American Motors. After the plaintiff had left the meeting, Homsey in turn endorsed the check to the defendants in repayment of his most recent borrowing. During the meeting Goldman advised the plaintiff that he had already received 1,000 shares of American Motors as collateral and expected to receive the promised additional 1,000 in a few days. The prior receipt of 1,000 shares was also acknowledged in writing and 1,200 additional shares of American Motors were delivered to Roberts & Co. as collateral some weeks later.

Thereafter, for almost a year Homsey paid the interest due on the loan, more collateral was delivered to the defendants and all apparently went well. Then came Homsey's downfall. The New York Stock Exchange suspended him and his brokerage firm. He and his firm were forced into receivership and ultimately he was jailed for criminal misconduct in the operation of his business.

When Homsey defaulted, the defendants called upon the plaintiff for interest due on her $184,000 note. When she did not pay, the defendants called the note and disposed of the collateral much of which, particularly the American Motors stock, had declined substantially in value.

This suit followed. The district court found that the defendants had not wronged or injured the plaintiff and the plaintiff has now appealed from the court's judgment.

In the court below and upon this appeal the plaintiff has attempted at great length to show that she has been victimized by a fraudulent and conspiratorial scheme in which Homsey and the defendants joined. But the record does not substantiate this claim.

The plaintiff relies heavily upon the fact that Goldman suggested to Homsey that he have someone else take over the transaction involving the $182,000 loan. But the lender's desire to reduce its large holdings of Homsey's paper does not indicate that to it the American Motors speculation then appeared in any way improper or even to be a losing venture. Obviously, if American Motors stock had appreciated substantially in market value the venture would have yielded a capital gain, as the plaintiff anticipated in the light of her previous profitable experience in trading in this stock and in another venture in similar association with Homsey. Moreover, the terms of the venture were very favorable to her, even more favorable than her prior profitable venture with Homsey. The plaintiff was lending her credit but contributing no capital other than the money borrowed. Homsey, apparently a reputable and successful financier, contracted to secure her against loss and to pay all interest on her borrowing. Her profit would be one half of any ultimate capital gain plus all dividends declared on the stock while she owned it. She could not lose so long as Homsey remained solvent. She had no reason to doubt that she was making a very good bargain and neither did Goldman, assuming he knew the details of the arrangements between Homsey and the plaintiff.

The only other circumstance said to indicate conspiracy is the failure of the defendants to inform the plaintiff that she was in effect taking over a stock purchase and a related borrowing already made by Homsey rather than making and financing a new purchase in the open market. But there was nothing to indicate to the defendants either that

the plaintiff did not fully understand what was being done or that an open market purchase would be more advantageous than the acquisition actually made. We have already pointed out that the guarantee provided by Homsey made the actual transaction extraordinarily favorable to the plaintiff. In that respect, an open market purchase would have been less advantageous. And finally, the defendants did inform the plaintiff, both orally and in the agreement for the deposit of collateral, that 1,000 of the 2,000 shares primarily involved in the transaction had already been deposited with it. It is difficult to square this disclosure with any contention that the defendants were party to any concealment of the fact that Homsey already owned the stock.

The plaintiff makes a separate contention that the defendants have not fully accounted for or credited her with the proceeds of her collateral, particularly her American Motors stock. To begin with, the record establishes 2,200 shares as the amount of this stock pledged to the defendants. A two to one stock split while the pledge was in effect increased the number of shares to 6,600. The defendants sold 6,000 shares and gave the plaintiff full credit for the proceeds. Homsey, whom plaintiff had authorized to handle the transaction, had been permitted to make a temporary withdrawal of some collateral. His subsequent redeposit failed to include 600 shares of American Motors. Accordingly, the defendants claimed and recovered the value of these shares in the Homsey receivership, and credited the plaintiff with the full amount. By taking bits of evidence, including answers to interrogatories, out of context, the plaintiff has sought to create the impression that additional American Motors stock was involved and not accounted for. In the view of the court below she failed in that endeavor and our own study of the record has led us to the same conclusion. There is simply no persuasive evidence that more than 2,200 shares of American Motors — 6,600 after

the stock split — were ever delivered to the defendants by or for the plaintiff.

We have not overlooked the claim that other stock belonging to the plaintiff and valued at $33,000 was wrongfully delivered to the defendants by Homsey as security for Homsey's own borrowings and, on liquidation, credited to Homsey. It is clear that the plaintiff entrusted this stock to Homsey as her agent with a stock power signed by her. Assuming her right to reimbursement for misappropriation of this stock can be extended beyond Homsey, the court below properly took into account that the New York Stock Exchange has paid the plaintiff $116,000 to compensate her for her broker's various defalcations. She has failed utterly to prove that this payment did not cover the items now in suit. A representative of the Stock Exchange testified in this case that the $116,000 payment covered these items. On the witness stand, the plaintiff herself, when asked whether this was not the fact, replied merely that she did not know.

In addition to the common law wrongs which we have discussed, the plaintiff complains that the defendants have violated provisions of the Securities Exchange Act of 1934. It is asserted that defendants' loans violated the margin requirements of Regulation T, 12 C.F.R. § 220, promulgated under authority of section 7 of the Securities Exchange Act, 15 U.S.C. § 78g. However, section 7(c) and the implementing regulation apply only to "any member of a national securities exchange or a broker or dealer who transacts a business in securities through the medium of any such member". The court below properly concluded that the defendants, a money lending partnership, were not such a broker or dealer. Regulation T, borrowing from section 3(a)(4) of the Act itself, 15 U.S.C. § 78c(a)(4), defines "broker" as "any person engaged in the business of effecting transactions in securities for the account of

others. . . ." It is true that in the course of its factoring business, the defendants accepted securities owned by borrowers as collateral. But their business was lending money and not trading in securities. When they sold or rehypothecated securities they did so in their own interest as a secured creditor and not in the course of trading for and in the interest of a client or customer. Thus, Roberts & Co. was not acting as a broker within the meaning of the statute and the regulation. See *In the Matter of Sutro Bros. & Co.*, 1963, S.E.C. Release #7052, 1961-64 Decs. CCH Securities Law Reporter para. 76,913 at 81,382, 384; 2 Loss, Securities Regulations 1257. The only case cited by the plaintiff as supporting her position, *S.E.C.* v. *Guild Films Co.*, 2d Cir. 1960, 279 F.2d 485, is an inapposite decision upon the meaning of the term "underwriters".

The plaintiff also seems to argue that the defendants have in some way violated section 7(d) of the Act, 15 U.S.C. § 78g(d), which makes unlawful any extension of credit by persons other than brokers and dealers for the purchase of securities in violation of credit restrictions imposed by the Federal Reserve Board. But the Board has not seen fit to exercise its power by restricting any such extension of credit by a factor as we have here.

Separately, the plaintiff contends that the defendants violated the Securities Exchange Act by aiding and abetting a violation by Homsey. The plaintiff reasons that section 7(c) of the Act prohibits a broker from arranging credit for a customer except on terms which conform to the margin and credit requirements of Regulation T and that the defendants instigated and participated in Homsey's arrangement for the plaintiff to borrow money from them for the purpose of purchasing securities. This is said to make Roberts & Co. an aider and abettor of Homsey's violation of his duty as a broker. Therefore, reasons the plaintiff, the defendants are civilly liable for any damage the plaintiff suffered as a result of the transaction.

For present purposes we assume, but do not decide, that both Homsey's arrangement of the loan and the defendants' recommendation that Homsey follow such a course were violations of restrictions upon broker participation in such a transaction as this. However, we think it does not follow that the plaintiff is entitled to rescind the loan or recover damages from the defendants.

We start with the consideration that, as an extension of credit by a lender who was not a broker to a borrower seeking to finance a purchase of stock, the transaction between the defendants and the plaintiff was lawful. We have already shown that no fraud or conspiracy was involved and that the proscriptions of Regulation T are inapplicable. We find no other relevant prohibition. Thus, the alleged wrong of the defendants was merely in causing Homsey's participation as a broker in an otherwise proper transaction between a lender and a borrower. The law reflects a strong policy against a broker playing a role in such a loan, not a policy of invalidating force against the credit transaction itself. We think effect should and can be given to both the policy permitting the loan itself and the policy proscribing broker participation in it. The validity of the loan can be recognized by denying the borrower as against the lender any such rescision or damages as this action seeks. On the other hand, the policy against broker arrangement of otherwise proper loans can be enforced through the various administrative disciplinary sanctions provided by the Act, or by injunctive relief or even criminal prosecution as such sanctions may be applicable in particular circumstances to a broker[1] or anyone who aids and abets his misconduct. See *e.g. In the Matter of Sutro Bros.*

[1] We find it unnecessary to consider whether sufficient basis exists for giving a borrower a right to recover damages against his broker who has violated Regulation T by arranging a valid unregulated factor loan for him.

& Co., supra. Cf. Associated Securities Corp. v. *S.E.C.* 10th Cir. 1961, 293 F.2d 738; *S.E.C.* v. *Timetrust Inc.*, N.D. Cal. 1939, 28 F.Supp. 34.

In urging that the civil remedies of rescision and damages should be available to her against the defendants because they aided and abetted Homsey's arrangements of the loan, the plaintiff relies principally upon *Remar* v. *Clayton Securities Corp.*, D. Mass. 1949, 81 F. Supp. 1014. But that decision turns upon the existence of the very circumstance, the absence of which here impedes the plaintiff's claim. In *Remar* a broker arranged for an extension of credit by a bank to the plaintiff. In the circumstances of that case, different from the present case, the bank loan itself was within the category of credit transactions prohibited by the Federal Reserve Board. Thus, in the view of the court, the broker who arranged and thus caused the independently illegal loan could properly be required to respond in damages for injury the borrower suffered through the illegal transaction. Here the loan was lawful and we see no reason to give the borrower civil relief from the consequences of her bargain as if the extension of credit had been unlawful or the lender had taken some advantage of her.

The appellant has argued several additional points. We have considered all of them and conclude that they do not demonstrate any reversible error.

The judgment is affirmed.

Appendix B

STATUTES, RULES AND REGULATIONS INVOLVED.

Securities Act of 1933, § 22 (15 U.S.C. § 77v)

"*Jurisdiction of offenses and suits*

(a) The district courts of the United States * * * shall have jurisdiction of offenses and violations under this subchapter and under the rules and regulations * * * to enforce any liability or duty created by this subchapter."

Securities Act of 1933, § 12 (15 U.S.C. § 771):

"*Civil liabilities arising in connection with prospectuses and communications*

Any person who—

* * *

(2) offers or sells a security * * * by the use of any means or instruments of transportation or communication in interstate commerce or of the mails, by means of a * * * oral communication, which includes an untrue statement of a material fact or omits to state a material fact necessary in order to make the statements, in the light of the circumstances under which they are made, not misleading, (the purchaser not knowing of such untruth or omission), and who shall not sustain the burden of proof that he did not know, and in the exercise of reasonable care could not have known, of such untruth or omission, shall be liable to the person purchasing such security from him, who may sue either at law or in equity in any court of competent jurisdiction, * * *."

Securities Act of 1933, § 15 (15 U.S.C. § 77(o)):

"*Liability of controlling persons.*

Every person who, by or through stock ownership, agency, or otherwise, or who, pursuant to or in connection with an agreement or understanding with one

or more other persons by or through stock ownership, agency, or otherwise, controls any person liable under sections 77k or 77l of this title, shall also be liable jointly and severally with and to the same extent as such controlled person to any person to whom such controlled person is liable, unless the controlling person had no knowledge of or reasonable ground to believe in the existence of the facts by reason of which the liability of the controlled person is alleged to exist."

Securities Exchange Act of 1934, § 3 (15 U.S.C. § 78c):

"*Definitions and application—Definitions*

(a) When used in this chapter, unless the context otherwise requires—

* * *

(4) The term 'broker' means any person engaged in the business of effecting transactions in securities for the account of others, but does not include a bank.

* * *

(10) The term 'security' means any note, stock, treasury stock, * * * or participation in any profit-sharing agreement * * * investment contract, * * * or in general, any instrument commonly known as a 'security'; . . .".

* * *

(13) The terms 'buy' and 'purchase' each include any contract to buy, purchase, or otherwise acquire.

(14) The terms 'sale' and 'sell' each include any contract to sell or otherwise dispose of.

Power to define technical, trade, and accounting terms

(b) The Commission and the Board of Governors of the Federal Reserve System, as to matters within their respective jurisdictions, shall have power by rules and regulations to define technical, trade, and

accounting terms used in this chapter insofar as such definitions are not inconsistent with the provisions of this chapter."

Securities Exchange Act of 1934, § 7 (15 U.S.C. § 78g):

"*Margin requirements*

(a) For the purpose of preventing the excessive use of credit for the purchase or carrying of securities, the Board of Governors of the Federal Reserve System shall, prior to October 1, 1934, and from time to time thereafter, prescribe rules and regulations with respect to the amount of credit that may be initially extended and subsequently maintained on any security (other than an exempted security) registered on a national securities exchange. For the initial extension of credit, such rules and regulations shall be based upon the following standard: An amount not greater than whichever is the higher of—

(1) 55 per centum of the current market price of the security, or

(2) 100 per centum of the lowest market price of the security during the preceding thirty-six calendar months, but not more than 75 per centum of the current market price.

(b) Notwithstanding the provisions of subsection (a) of this section, the Board of Governors of the Federal Reserve System, may, from time to time, with respect to all or specified securities or transactions, or classes of securities, or classes of transactions, by such rules and regulations (1) prescribe such lower margin requirements for the initial extension or maintenance of credit as it deems necessary or appropriate for the accommodation of commerce and industry, having due regard to the general credit situation of the country, and (2) prescribe such higher margin requirements for the initial extension or maintenance

of credit as it may deem necessary or appropriate to prevent the excessive use of credit to finance transactions in securities.

(c) It shall be unlawful for any member of a national securities exchange or any broker or dealer who transacts a business in securities through the medium of any such member, directly or indirectly to *extend* or maintain credit or *arrange* for the extension or maintenance of credit to or for any customer—

(1) On any security (other than an exempted security) registered on a national securities exchange, in contravention of the rules and regulations which the Board of Governors of the Federal Reserve System shall prescribe under subsections (a) and (b) of this section.

* * *

(d) It shall be unlawful for any person not subject to subsection (c) of this section to extend or maintain credit or to arrange for the extension or maintenance of credit for the purpose of purchasing or carrying any security registered on a national securities exchange, in contravention of such rules and regulations as the Board of Governors of the Federal Reserve System shall prescribe to prevent the excessive use of credit for the purchasing or carrying of or trading in securities in circumvention of the other provisions of this section. Such rules and regulations may impose upon all loans made for the purpose of purchasing or carrying securities registered on national securities exchanges limitations similar to those imposed upon members, brokers, or dealers by subsection (c) of this section and the rules and regulations thereunder. This subsection and the rules and regulations thereunder shall not apply (A) to a loan made by a person not in the ordinary course of his

business, (B) to a loan on an exempted security, (C) to a loan to a dealer to aid in the financing of the distribution of securities to customers not through the medium of a national securities exchange, (D) to a loan by a bank on a security other than an equity security, or (E) *to such other loans as the Board of Governors of the Federal Reserve System shall, by such rules and regulations as it may deem necessary or appropriate in the public interest or for the protection of investors, exempt, either unconditionally or upon specified terms and conditions or for stated periods, from the operation of this subsection and the rules and regulations thereunder.*

(e) * * *" (emphasis supplied)

Securities Exchange Act of 1934, § 8 (15 U.S.C. § 78h):

"Restrictions on borrowing by members, brokers and dealers

It shall be unlawful for any member of a national securities exchange, or any broker or dealer who transacts a business in securities through the medium of any such member, directly or indirectly—

(a) To borrow in the ordinary course of business as a broker or dealer on any security (other than an exempted security) registered on a national securities exchange except (1) from or through a member bank of the Federal Reserve System, (2) from any nonmember bank which shall have filed with the Board of Governors of the Federal Reserve System an agreement, * * * or (3) in accordance with such rules and regulations as the Board of Governors of the Federal Reserve System may prescribe to permit loans between such members and/or brokers and/or dealers, or to permit loans to meet emergency needs. * * *

(b) * * *

(c) In contravention of such rules and regulations as the Commission shall prescribe for the protection of investors to hypothecate or arrange for the hypothecation of any securities carried for the account of any customer under circumstances (1) that will permit the commingling of his securities without his written consent with the securities of any other customer, (2) that will permit such securities to be commingled with the securities of any person other than a bona fide customer, or (3) that will permit such securities to be hypothecated, or subjected to any lien or claim of the pledgee, for a sum in excess of the aggregate indebtedness of such customers in respect to such securities.

(d) To lend or arrange for the lending of any securities carried for the account of any customer without the written consent of such customer. * * *"

Securities Exchange Act of 1934, § 10 (15 U.S.C. § 78j):

"*Manipulative and deceptive devices*

It shall be unlawful for any person, directly or indirectly, by the use of any means or instrumentality of interstate commerce or of the mails, or of any facility of any national securities exchange—

* * *

(b) To use or employ, in connection with the purchase or sale of any security registered on a national securities exchange or any security not so registered, any manipulative or deceptive device or contrivance in contravention of such rules and regulations as the Commission may prescribe as necessary or appropriate in the public interest or for the protection of investors. * * *

Securities Exchange Act of 1934, § 11 (15 U.S.C. § 78k):

"*Segregation and limitation of functions of members, brokers, and dealers*

* * *

(d) It shall be unlawful for a member of a national securities exchange who is both a dealer and a broker, or for any person who both as a broker and a dealer transacts a business in securities through the medium of a member or otherwise, to effect through the use of any facility of a national securities exchange or of the mails or of any means or instrumentality of interstate commerce, or otherwise in the case of a member, (1) * * * (2) any transaction with respect to any security (other than an exempted security) unless, if the transaction is with a customer, he discloses to such customer in writing at or before the completion of the transaction whether he is acting as a dealer for his own account, as a broker for such customer, or as a broker for some other person. * * *"

Securities Exchange Act of 1934, § 20 (15 U.S.C. § 78t):

"*Liabilities of controlling persons*

(a) Every person who, directly or indirectly, controls any person liable under any provision of this chapter or of any rule or regulation thereunder shall also be liable jointly and severally with and to the same extent as such controlled person to any person to whom such controlled person is liable, unless the controlling person acted in good faith and did not directly or indirectly induce the act or acts constituting the violation or cause of action."

* * *

Securities Exchange Act of 1934, § 27 (15 U.S.C. § 78aa):

"*Jurisdiction of offenses and suits*

The district courts of the United States * * * shall have exclusive jurisdiction of violations of this chap-

ter or the rules and regulations thereunder, and of all suits in equity and actions at law brought to enforce any liability or duty created by this chapter or the rules and regulations thereunder. * * *"

Securities Exchange Act of 1934, § 28 (15 U.S.C. § 78bb):

"*Effect on existing law*

(a) The rights and remedies provided by this chapter shall be in addition to any and all other rights and remedies that may exist at law or in equity; * * *"

Securities Exchange Act of 1934, § 29 (15 U.S.C. § 78cc):

"*Validity of contracts*

* * *

(b) Every contract made in violation of any provision of this chapter or of any rule or regulation thereunder, and every contract (including any contract for listing a security on an exchange) heretofore or hereafter made, the performance of which involves the violation of, or the continuance of any relationship or practice in violation of, any provision of this chapter or any rule or regulation thereunder, shall be void (1) as regards the rights of any person who, in violation of any such provision, rule, or regulation, shall have made or engaged in the performance of any such contract, and (2) as regards the rights of any person who, not being a party to such contract, shall have acquired any right thereunder with actual knowledge of the facts by reason of which the making or performance of such contract was in violation of any such provision, rule, or regulation: Provided, (A) that no contract shall be void by reason of this subsection because of any violation of any rule or regulation prescribed pursuant to paragraph (2) or (3) of subsection (c) of section 78o of this title, and (B) that no contract shall be deemed to be void by reason of this subsection in any action maintained in reliance

upon this subsection, by any person to or from whom any broker or dealer sells, or from or for whom any broker or dealer purchases, a security in violation of any rule or regulation prescribed pursuant to paragraph (1) of subsection (c) of section 78o of this title, unless such action is brought within one year after the discovery that such sale or purchase involves such violation and within three years after such violation.

(c) * * * "

Investment Advisers Act of 1940, § 7 (15 U.S.C. § 80b-5):

"*Investment advisory contracts*

No investment adviser, unless exempt from registration pursuant to section 80b-3 of this title, shall make use of the mails or any means or instrumentality of interstate commerce, directly or indirectly, to enter into, extend, or renew any investment advisory contract, or in any way to perform any investment advisory contract entered into, extended, or renewed on or after November 1, 1940, if such contract—

(1) provides for compensation to the investment adviser on the basis of a share of capital gains upon or capital appreciation of the funds or any portion of the funds of the client.

* * *

As used in this section, "investment advisory contract" means any contract or agreement whereby a person agrees to act as investment adviser or to manage any investment or trading account for a person other than an investment company. * * *"

Investment Advisers Act of 1940, § 8, 9 (15 U.S.C. § 80b-6):

"*Prohibited transactions by investment advisers*

It shall be unlawful for any investment adviser, by use of the mails or any means or instrumentality of interstate commerce, directly or indirectly—

(1) to employ any device, scheme, or artifice to defraud any client or prospective client;

(2) to engage in any transaction, practice, or course of business which operates as a fraud or deceit upon any client or prospective client;

(3) acting as principal for his own account, knowingly to sell any security to or purchase any security from a client, or acting as broker for a person other than such client, knowingly to effect any sale or purchase of any security for the account of such client, without disclosing to such client in writing before the completion of such transaction the capacity in which he is acting and obtaining the consent of the client to such transaction. The prohibitions of this paragraph shall not apply to any transaction with a customer of a broker or dealer if such broker or dealer is not acting as an investment adviser in relation to such transaction;

(4) to engage in any act, practice, or course of business which is fraudulent, deceptive, or manipulative. The Commission shall, for the purposes of this paragraph (4) by rules and regulations define, and prescribe means reasonably designed to prevent, such acts, practices, and courses of business as are fraudulent, deceptive, or manipulative."

Investment Adviser's Act of 1940, 54 Stat. 856 (15 U.S.C. § 80b-14)

"*Jurisdiction of offenses and suits*

The district courts of the United States * * * shall have jurisdiction of violations of this subchapter . . .".

62 Stat. 684 (18 U.S.C. § 2):

"*Principals*

(a) Whoever commits an offense against the United States, or aids, abets, counsels, commands, induces, or procures its commission, is a principal.

(b) Whoever causes an act to be done, which if directly performed by him would be an offense against the United States, is also a principal and punishable as such."

62 Stat. 701 (18 U.S.C. § 371):

"*Conspiracy to commit offense or to defraud United States*

If two or more persons conspire either to commit any offense against the United States, or to defraud the United States, or any agency thereof in any manner or for any purpose, and one or more of such persons do any act to effect the object of the conspiracy, each shall be fined not more than $10,000 or imprisoned not more than five years, or both. * * *"

REGULATION T OF BOARD OF GOVERNORS OF THE FEDERAL RESERVE SYSTEM:

"Section 220.2(c)

(c) The term "*customer*" includes any person, or any group of persons acting jointly, * * * (2) who, in accordance with the ordinary usage of trade, would be considered a customer of the creditor.

It includes, in case the creditor is a firm, any partner in the firm who would be considered a customer of the firm if he were not a partner, and includes any joint adventure in which a creditor participates and which would be considered a customer of the creditor if the creditor were not a participant.

Section 220.7 *Miscellaneous Provisions*

(a) *Arranging for loans by others.* A creditor may arrange for the extension or maintenance of

credit to or for any customer of such creditor by any person upon the same terms and conditions as those upon which the creditor, under the provisions of this part, may himself extend or maintain such credit to such customer, but only upon such terms and conditions, * * *

* * *

(c) *Declaration as to purpose of loan.* Every extension of credit on a registered security (other than an exempted security) *shall be deemed to be for the purpose of purchasing or carrying or trading in securities,* unless the customer shall file with the creditor a written declaration signed by the customer which shall state the use to be made of such credit and which shall state specifically that such credit is neither for the purpose of purchasing or carrying or trading in securities nor for the purpose of evading or circumventing the provisions of this part. * * *'' (emphasis supplied)

* * *

REGULATION U OF BOARD OF GOVERNORS OF THE FEDERAL RESERVE SYSTEM:

''Section 221.3(b)(1)—*Miscellaneous Provisions*

* * *

(b)(1) A loan made to a borrower when he has owned a stock registered on a national securities exchange free of any lien for a continuous period of as much as one year need not be treated as a loan for the purpose of ''carrying'' that stock unless the loan is for the purpose of reducing or retiring indebtedness incurred to purchase that stock. A loan also need not be treated as a loan for the purpose of ''carrying'' a stock registered on a national securities exchange if the loan is for the purpose of meeting emergency expenses not

reasonably foreseeable or meeting recurring expenses the borrower has customarily met by temporary borrowing."

RULE 8c-1 OF THE SECURITIES AND EXCHANGE COMMISSION:

"(a) *General Provisions*—No member of a national securities exchange, and no broker or dealer who transacts a business in securities through the medium of any such member shall, directly or indirectly hypothecate or arrange for or *permit* the continued hypothecation of any securities carried for the account of any customer under circumstances—

(1) that will *permit* the commingling of securities carried for the account of any such customer with securities carried for the account of any other customer, without first obtaining the written consent of each such customer to such hypothecation;

(2) that will *permit* such securities to be commingled with securities carried for the account of any person other than a bona fide customer of such member, broker or dealer under a lien for a loan made to such member, broker or dealer; or

* * *

(b) Definitions.—For the purposes of this rule

(1) the term 'customer' shall not be deemed to include any general or special partner or any director or officer of such member, broker or dealer, or any participant, as such, in any joint, group or syndicate account with such member, broker or dealer or with any partner, officer, or director thereof;

* * *

(f) *Notice and certification requirements*—No person subject to this section shall hypothecate any security carried for the account of a customer unless, at or prior to the time of each such hypothecation, *he gives written notice to the pledgee that the security pledged*

is carried for the account of a customer and that such hypothecation does not contravene any provision of this rule, except that in the case of an omnibus account the member, broker or dealer for whom such account is carried may furnish a signed statement to the person carrying such account that all securities carried therein by such member, broker or dealer will be securities carried for the account of his customers and that the hypothecation thereof by such member, broker or dealer will not contravene any provision of this rule. The provisions of this paragraph shall not apply to any hypothecation of securities under any lien or claim of a pledgee securing a loan made and to be repaid on the same calendar day." (emphasis supplied)

RULE 10b-5 OF THE SECURITIES AND EXCHANGE COMMISSION:

"It shall be unlawful for any person, directly or indirectly, by the use of any means or instrumentality of interstate commerce, or of the mails, or of any facility of any national securities exchange,

(1) to employ any device, scheme, or artifice to defraud,

(2) to make any untrue statement of a material fact or to omit to state a material fact necessary in order to make the statements made, in the light of the circumstances under which they were made, not misleading, or

(3) to engage in any act, practice, or course of business which operates or would operate as a fraud or deceit upon any person, in connection with the purchase or sale of any security."

FEDERAL RULES OF CIVIL PROCEDURE:

"Rule 8. General Rules of Pleading

(c) In pleading to a preceding pleading, a party *shall* set forth affirmatively. . .payment, release. . .and

any other matter constituting an avoidance or affirmative defense. . .

(d) Averments in a pleading to which a responsive pleading is required, other than those as to the amount of damage, are *admitted* when not denied in the responsive pleading." . . .

"Rule 12. Defenses and Objections

(h) A party *waives* all defenses and objections which he does not present either by motion as hereinbefore provided for," . . .

"Rule 15. Amended and Supplemental Pleadings.

(a) . . .A party *shall* plead in response to an amended pleading within the time remaining for response to the original pleading or within 10 days after service of the amended pleading, whichever period may be the longer, unless the court otherwise orders."

"Rule 52. Findings by the Court

(a) Effect. In all actions tried upon the facts without a jury. . . , the court *shall* find the facts specially and state separately its conclusions of law thereon. . . "

CONSTITUTION OF THE UNITED STATES, AMENDMENT V:

"No person shall be . . . deprived of . . . property, without due process of law;" . . .

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Supreme Court of the United States.

OCTOBER TERM, 1966.

No. 514.

MANJA T. BRONNER,
Petitioner,
v.
ARTHUR L. GOLDMAN ET AL.,
Respondents.

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI.

Respondents respectfully submit that the petition for a writ of certiorari filed in this case should be denied, for the following reasons:

1. The petitioner has failed to comply with Rule 23 of the Revised Rules of the Supreme Court of the United States, which requires, among other things, that the petition shall contain—

A. A concise statement of the case containing the facts material to the consideration of the questions presented (Rule 23(e)), and

B. A direct and concise statement amplifying the reasons relied on for the allowance of the petition (Rule 23(h)).

2. The petitioner has failed to show that the decision rendered by the Court of Appeals for the First Circuit in the instant case is in conflict with the decisions of the

Court of Appeals of another circuit on the same matter (Rule 19(b)).

3. The petitioner has failed to show that the Court of Appeals for the First Circuit has decided a Federal question of such importance or magnitude that it merits consideration by the Supreme Court of the United States (Rule 19(b)).

Argument.

1. THE PETITIONER HAS FAILED TO COMPLY WITH RULE 23 OF THE REVISED RULES OF THE SUPREME COURT OF THE UNITED STATES.

A reading of Rule 23 makes it quite plain that the spirit and intent, as well as the letter, of that rule is to require a petitioner for a writ of certiorari to present to the court a brief and clear statement of the material facts of the case, and an equally concise argument in support of the reasons relied upon for the allowance of the writ. In these respects the petitioner in the instant case has failed to comply with the rule. The inherent weakness in the petition is that the petitioner assumes as facts matters which were decided adversely to her in the District Court, and, on the basis of such gratuitous assumptions, seeks to apply principles of law which have no application to the case at bar. This case was fully and fairly tried on its merits before a judge sitting without a jury in the District Court of the United States at Boston. That court rendered its opinion on December 30, 1964—an opinion in all material respects at variance with the position of the petitioner. Thereafter, on June 3, 1965, in response to a motion by the petitioner for further findings of fact and conclusions of law, the District Court entered an order making findings of

fact which particularized the court's earlier opinion to the extent deemed appropriate by the court. Following an appeal and the submission of briefs, the case was argued before the Court of Appeals for the First Circuit, and on May 19, 1966, the court affirmed the judgment of the District Court in an opinion concurred in by all three judges of the Court of Appeals. An application for a rehearing was made by the petitioner and denied without opinion by the Court of Appeals on June 10, 1966.

The course being followed by the petitioner in her petition for certiorari is precisely the same as was followed by her when the case was before the United States Court of Appeals. Either disregarding or disputing the findings of fact and the opinion of the trial judge who heard the evidence and saw the witnesses at the trial, the petitioner is seeking in effect to obtain a trial *de novo* on the facts in this court. Despite the clear finding of the District Court that there was no conspiracy to which the respondents were parties, and in the face of the unqualified statement of the Court of Appeals, which had reviewed the record, that "the record does not substantiate this claim," the petitioner, both in her so-called "Statement of the Case" and in her "Argument," repeatedly seeks to show that there was a conspiracy to which the respondents were parties.

The petition for certiorari is replete with such expressions as "respondents' wrongful recommendation to the broker" (p. 6); "conduct tempting dishonor" (p. 10); "petitioner obviously did not realize she had been chosen to serve as the *victim* of the bail-out sought to be affected by the respondents" (p. 15); "Goldman [*i.e.*, one of the respondents] was aware of said violation" (p. 17); "consideration of the fairness of the terms of the main transaction which pursuant to respondents' recommendation, the petitioner was fraudulently induced to enter . . ." (p. 19);

"the observations of the Circuit Court to the contrary notwithstanding, these were facts known by the respondents which gave them notice that the American Motors speculation was improper and a losing venture. Respondents knew that Homsey's borrowings were illegally arranged by him" (p. 19); "respondents were criminally liable even for those wrongs of Homsey as to which they might have had no specific knowledge" (p. 25); "said lack of good faith as well as respondents' merely causing the broker to have violated the margin regulations" (pp. 26, 27).

The petitioner made all of these and many more similar charges in the District Court in a vain endeavor to prove a conspiracy to which the respondents were alleged to be parties. The petitioner failed in her proof, as the record in the case abundantly demonstrates. Apparently the petitioner believes that an allegation repeated often enough becomes a fact and the basis for predicating liability on a party whose conduct has been carefully scrutinized by a trial court and who has been held blameless for whatever loss the petitioner suffered. Even making allowances for the exaggerations and excesses of a disappointed litigant, there would appear to be no justification for the technique employed by the petitioner in seeking judicial review of the judgment of the District Court, affirmed without dissent by the Court of Appeals.

Nowhere in the petition is there a direct statement of the manner in which the court below obtained jurisdiction. Paragraph 2 of the petition makes a broad allegation that the Securities and Exchange Act was violated. Nowhere is there a concise statement of the facts or a concise statement of the reasons which are relied on for the granting of the writ. In most aspects the petition is prolix and incomprehensible.

For these reasons the respondents respectfully submit that the petitioner has failed to comply with Rule 23(e) and (h).

2. THE PETITIONER HAS FAILED TO SHOW THAT THE DECISION RENDERED BY THE COURT OF APPEALS FOR THE FIRST CIRCUIT IS IN CONFLICT WITH THE DECISIONS OF THE COURT OF APPEALS OF ANOTHER CIRCUIT ON THE SAME MATTER.

The respondents have reviewed the cases cited by the petitioner on pages 5 to 8 of her petition and are unable to understand the basis on which the petitioner claims conflict with the decisions of other circuits. It would appear to the respondents that, not only are none of the cases cited in point with the instant case, but the facts in those cases bear no resemblance whatsoever to the facts involved in the present case. The cases cited involve either breach of contract involving the sale of securities, as in the case of *Smith* v. *Bear,* 237 F. 2d 79 (2 Cir. 1956), an action for damages resulting from the sale of stock because of failure to meet margin requirements, as in the case of *Goldenberg* v. *Bache & Co.,* 270 F. 2d 675 (5 Cir. 1959); so-called "control provision" cases, as in the case of *R. H. Johnson Co.* v. *Securities & Exchange Commission,* 198 F. 2d 690 (2 Cir. 1952); the sale of unregistered stock, as in the case of *Stadia Oil & Uranium Co.* v. *Wheelis,* 251 F. 2d 269 (10 Cir. 1957); wrongful sale of property bought on a conditional-sales contract, as in the case of *James Talcott, Inc.,* v. *Associates Discount Corp.,* 302 F. 2d 443 (8 Cir. 1962); a forged check, as in the case of *United States* v. *First National Bank of Prague, Okl.,* 124 F. 2d 484 (10 Cir. 1941); the taking of property by Federal officials acting beyond the scope of their authority, as in the case of *Johnston* v. *Earle,* 245 F. 2d 793 (9 Cir. 1957); the receipt of compensation from a collateral source

or free medical care by a person sustaining injuries while a passenger on a common carrier, as in the case of *Sainsbury* v. *Pennsylvania Greyhound Lines, Inc.*, 183 F. 2d 548 (4 Cir. 1950); and, finally, a case involving the application of Rule 52 (a) of the Federal Rules of Civil Procedure regarding the duty of the trial court to find the facts specially and state separately its conclusions of law therein, as in the case of *Kweskin* v. *Finkelstein*, 223 F. 2d 677 (7 Cir. 1955).

Not one of the cases cited above, or any of the others cited in the petitioner's petition, has even the remotest tendency to show a conflict between the decision in the instant case and the decisions of other circuits. None has any bearing on a violation of Regulation T of the Federal Reserve Board, as alleged here. It is respectfully submitted that, when Rule 19 of this court refers to a decision by a Court of Appeals which is "in conflict with the decisions of another court of appeals on the same matter," it means just that, and not something else. It certainly does not mean a vague and indefinite reference to a principle of law applied to an entirely different set of facts bearing no resemblance to the facts on which a review is being sought in the Supreme Court by the petitioner. Hence it is respectfully submitted that, on this basis, the petitioner's writ of certiorari should be denied.

3. THE PETITIONER HAS FAILED TO SHOW THAT THE COURT OF APPEALS FOR THE FIRST CIRCUIT HAS DECIDED ANY SUBSTANTIAL FEDERAL QUESTION WHICH MERITS CONSIDERATION OF THE SUPREME COURT OF THE UNITED STATES.

If we strip this petition of all of its excess verbiage and view it in the light of the record, upon which review in the Supreme Court must necessarily be based, it is submitted

that it is entirely lacking in merit. The complaint in this case basically alleged a common-law conspiracy to which the respondents were parties, and other wrongful conduct by the respondents. As to the conspiracy, the District Court found that there was none, and the Court of Appeals, on page 4 of its opinion, sustained the finding of the District Court with this language:

> "In the court below and upon this appeal the plaintiff has attempted at great length to show that she has been victimized by a fraudulent and conspiratorial scheme in which Homsey and the defendants joined, but the record does not substantiate this claim."

As to any other alleged conduct of the respondents, we need go no further than to cite to this court the following paragraph of the District Court's order of June 3, 1965, which reads as follows:

> "I find as a fact that the defendants did not by their acts or omissions, verbal or otherwise, induce or cause or lead the plaintiff to enter into the transaction of which she complains in this case. I find as a fact that defendant did not cause any injury to plaintiff, because I find that nothing said or done by defendants was in fact relied upon in any way, shape or manner by the plaintiff who has been found by the court in the opinion previously filed to have been a joint venturer with Homsey and to have voluntarily entered into the transaction complained of in reliance of her prior dealings with Homsey, for which it has already been ruled that defendants were not responsible. I further find that defendants did not violate any affirmative duty of disclosure owing to plaintiff."

The sole question presented to this court on the basis of the record in this case is whether the respondents violated the Securities Exchange Act of 1934 (15 U.S.C. § 78 *et seq.*), by being in some manner an aider and abettor of a broker's alleged violation of his duty as a broker.

Under the provisions of this Act, the Federal Reserve Board was empowered to regulate the extension of credit in connection with the sale of securities. Regulation T, promulgated by the Board, regulated brokers; Regulation U regulated banks. The sole ground of Federal jurisdiction lies in an allegation that these regulations were violated by the respondents. Title 15 U.S.C. § 78c (b) provides that in such event the petitioner might have a remedy. However, the District Court ruled, and the Court of Appeals upheld the ruling, that the respondents did not violate the Securities Exchange Act. Since they were not brokers, they could not violate Regulation T; since they were not a bank, they could not violate Regulation U. In the only case cited by the petitioner which has any bearing on the instant case, *Remar* v. *Clayton Securities Corp.* (D. Mass. 1949), 81 F. Supp. 1014, the defendant broker arranged for the extension of credit by a *bank* to the plaintiff. Hence the *loan itself* was within the category of credit transactions prohibited by the Federal Reserve Board in Regulation U. The respondents here, however, were not a bank, nor were they in *any classification of lenders* whose lending under such circumstances had been proscribed by any rule or regulation. The extension of credit by the respondents here was therefore lawful, and there is nothing in the unsupported statement of the petitioner on page 8 of her brief that should impel the Supreme Court to rewrite Regulation T or U, or to extend them by judicial construction. The Federal Reserve Board cannot be said to be unaware of the existence and operations of persons

who fall into the category of factors—such as the respondents in the instant case. This follows from the fact that, while the Federal Reserve Board has made factors subject to the provisions of its reporting regulations, it has not seen fit to make them subject to its regulations restricting loans. See Federal Reserve Board Regulation U, § 221.3 (j), which reads as follows:

> "Every bank and every person engaged in the business of extending credit, who in the ordinary course of business extended credit for the purpose of purchasing or carrying securities registered on a national securities exchange, shall make such reports as the Board of Governors of the Federal Reserve System may require. . . ."

Since the Federal Reserve Board has not regulated the type of loan that was made in this case, there can be no violation of Regulation T or U, or any other rule promulgated by the appropriate Federal regulatory agency; therefore there is no basis for the grant of a writ of certiorari.

Finally, although the record in this case is replete with evidence that the petitioner and her broker, who was her principal witness at the trial, were engaged in a joint venture—a fact that both the District Court and the Court of Appeals readily accepted—the petition filed herein is strangely silent on this aspect of the case. The broker here was the petitioner's broker and adviser, and he had engaged in a similar joint venture with her at an earlier date. If any wrong were done to the petitioner, it was done by her broker and her joint adventurer, for whose conduct the respondents are not responsible, either legally or morally. In such circumstances the petitioner cannot prevail in her petition for a writ of certiorari.

Conclusion.

For the reasons set forth above, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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HENRY M. LEEN,
THOMAS J. CARENS,
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Of Counsel.

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In the Supreme Court of the United States.

OCTOBER TERM, 1966

No. 514

MANJA T. BRONNER,
PETITIONER,

v.

ARTHUR L. GOLDMAN ET AL.,
RESPONDENTS.

BRIEF IN REPLY TO RESPONDENTS' BRIEF IN OPPOSITION TO PETITION FOR CERTIORARI

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In the
Supreme Court of the United States

OCTOBER TERM, 1966

No. 514

MANJA T. BRONNER,
PETITIONER,

v.

ARTHUR L. GOLDMAN ET AL.,
RESPONDENTS.

BRIEF IN REPLY TO RESPONDENTS' BRIEF IN OPPOSITION TO PETITION FOR CERTIORARI

Argument

1. PETITIONER HAS COMPLIED WITH RULE 23 OF THE REVISED RULES OF THE SUPREME COURT OF THE UNITED STATES

The requirement of Rule 23 as to the brevity of the statement of material facts of the case and the argument in support of the reasons relied upon for the allowance of the writ of certiorari can be applied only in context of the

number and complexity of the issues involved. Where, as in the case sub-judice, review of six substantial questions of federal law and numerous aspects thereof is sought, the required "brevity" is plainly of a different dimension than that which governs a case of lesser importance or magnitude.

* * * * *

Although petitioner believes that the basis for federal jurisdiction in the court of first instance has already been set forth in compliance with sub-section (g) of the Rule, the following is intended to specify more fully such basis:

Violation—either directly or indirectly by virtue of aiding and abetting, conspiracy and other participation or acting with knowledge of the violations of the petitioner's broker and investment adviser—of the following provisions of federal securities legislation and rules and regulations thereunder: —Securities Act of 1933, Section 11 (15 U.S.C. §77 k); Section 12(2) (15 U.S.C. §77 l (2)); Securities and Exchange Act of 1934, Section 7(a)(c) and (d) (15 U.S.C. §78g(a)(c) and (d)); Section 8(a)(c) and (d) (15 U.S.C. §78h(a)(c) and (d)); Section 9 (15 U.S.C. §78 (i)); Section 10(b) (15 U.S.C. §78j (b)); Rules 8c-1 and 10b-5 of the Securities and Exchange Commission (17 C.F.R. §240.8c-1 and §240.10b-5); Regulation T of the Board of Governors of the Federal Reserve System (§220.2(c) and §220.7); Investment Advisers Act, Section 7 (15 U.S.C. §80b-5); Sections 8 and 9 (15 U.S.C. §80b-6).

Imputation of liability under the "control" provisions; Securities Act of 1933, Section 15 (U.S.C. §77o); and the Securities and Exchange Act of 1934, Section 20 (15 U.S.C. §78t).

Imputation of liability under federal "aider and abettor" statutes; 62 Stat. 684, 717 (18 U.S.C. §2); 62 Stat. 701 (18 U.S.C. §371).

Imputation of liability by virtue of the application of

common law principles of agency, i.e., respondeat superior, and general concepts of equity and restitution to federal substantive law.

Imputation of liability by virtue of respondents' knowledge of the statutory wrongs of the petitioner's broker and investment adviser; Securities and Exchange Act of 1934, Section 29(b) (15 U.S.C. §78cc(b)); Investment Advisers Act, 54 Stat. 856 (15 U.S.C. §80b-15).

General jurisdiction sections of federal securities legislation; Securities Act of 1933, Section 22 (15 U.S.C. §77v); Securities and Exchange Act of 1934, Section 27 (15 U.S.C. §78aa); Investment Advisers Act, 54 Stat. 856 (15 U.S.C. §80b-14).

2. THE FACTS ASSUMED BY THE PETITION FOR A WRIT OF CERTIORARI ARE SUPPORTED BY THE RECORD AND THE FINDINGS OF BASIC FACTS.

Respondents broadly contend that "petitioner assumes as facts matters which were decided adversely to her—" and that she seeks "in effect a trial *de novo* on the facts in this court (pp. 2-3). Thus, it is urged that respondents did not *wrongfully* recommend to the broker that he arrange for his loan to be taken over by the petitioner. But the Circuit Court assumed that the "recommendation that Homsey follow such a course [were] (was a) violation[s] of restrictions upon broker participation" and that under such circumstances criminal sanctions may be applicable "to a broker or *anyone who aids and abets his misconduct.*" (emphasis supplied) (Opinion, p. 8). The record also makes plain that the broker's common law and statutory wrongs toward the petitioner were committed in *furtherance* of such recommendation. And in this vein, the Circuit Court stated: —"To this end, Homsey turned to the plaintiff." (Opinion, p. 2). This Court, consequently, is not being asked to find basic facts but, on the contrary,

is respectfully requested to *rule* that respondents, as a matter of *law,* are civilly liable for the losses sustained by the petitioner as a result of their recommendation to the broker to commit an illegal act and for such other illegal acts committed by the broker in *furtherance* of such recommendation.

Petitioner has urged that respondents had notice of facts indicating to them that the American Motors transaction was an improper and losing venture.[1] The *fact* that respondents' recommendation was prompted by their concern as to Homsey's ability to repay was found by both lower courts (R. 378; and Opinion, p. 2). The *fact* that the price paid by the petitioner was substantially higher than the market value of the American Motors shares was stipulated and the *fact* that respondents were aware of this price differential is self-evident (Petition for Writ of Certiorari, pp. 12 and 15). Accordingly, the conclusion that petitioner seeks this Court to reach, to wit, that respondents engaged in "conduct tempting dishonor" and failed to exercise good faith, raises a question of law and not an issue of fact; and, the conflict between such *conclusion* and those drawn by the lower courts does not stem from an assumption of *facts* in variance to those found by said courts, but from a difference of legal interpretation.

3. Conclusions or Findings of Ultimate Facts Are Subject to Review by This Court

In Re The E. A. Packer, 140 U.S. 360, 11 S. Ct. 794, 795 (1891)

Fiske v. *State of Kansas,* 274 U.S. 380, 47 S. Ct. 655, 656, 657 (1927)

[1] The district court fastidiously avoided making reference to this issue even though petitioner, although not so required, made request for findings of fact on the issue (R. 355, #7 and 8). The Circuit Court *concluded* that respondents had no such notice.

Baumgartner v. *United States,* 322 U.S. 665, 64 S. Ct. 1220, 1243, 1244 (1944)

"And this Court will review the findings of facts where a Federal right has been denied as the result of a finding shown by the record to be without evidence to support it; or where a conclusion of law as to a Federal right and a finding of fact are so intermingled as to make it necessary in order to pass upon the Federal question, to analyze the facts. *Northern Pac. R.* v. *North Dakota,* 236 U.S. 585, 35 S. Ct. 429; *Aetna Life Ins. Co. Dunken,* 266 U.S. 389, 394, 45 S. Ct. 129."

Fiske v. *United States* (ubi supra)

Respondents' participation in the statutory wrongs of the broker and their liability ensuing therefrom constitute *legal* issues capable of determination upon the undisputed *basic facts, documentary evidence, admissions* and *stipulations* and the resolution of such issues does not require an inquiry into the credibility of witnesses. Issues of such a nature are subject to review; cf, *International Minerals & Chemical Corp.* v. *Moore,* 361 F. 2d. 851 (5 Cir., 1966).

The Circuit Court's conclusion that respondents had no notice as to the impropriety of the American Motors transaction was erroneous for the further reason that the Circuit Court, in spite of the statutory language to the contrary,[2] implicitly assumed that the petitioner had the bur-

[2] Section 12(2) [15 U.S.C. §771(2)] provides "—and who shall not sustain the burden of proof that he did not know, and in the exercise of reasonable care could not have known, of such untruth or omission shall be liable—"; and Section 15 [U.S.C. §77o] provides "—shall also be liable jointly and severally with and to the same extent as such controlled person—unless the controlling person had no knowledge of or reasonable ground to believe in the existence of facts by reason of which the liability of the controlled person is alleged to exist." Section 20 of the Securities and Exchange Act [15

den of proof to show such notice. And the conclusions that petitioner "has utterly failed to prove that this payment did not cover the items now in suit" (Opinion, p. 6) and that "plaintiff has failed to prove that—any unauthorized withdrawal of any of her collateral has taken place" [R. 384] also assumed erroneous impositions of the burden of proof.[3]

> "... if the trier of facts labored under such a serious legal misapprehension as to which party bore the burden of proof, its ultimate fact findings are not clothed with the insulation of Rule 52(a) and may be disregarded—"
>
> *Fulton National Bank* v. *Tate,* 363 F. 2d. 562, 566, 567 (5 Cir., 1966)
>
> See also; *United States* v. *Intermountain Furniture Mfg. Co.,* 363 F. 2d. 554, 557 (10 Cir., 1966)

Conclusions of the lower courts were not predicated upon findings of basic facts as required by Rule 52 of the F.R.-

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U.S.C. §78t] has no "unless" clause such as contained in Section 15 (supra). Consequently the language of Section 28(a) [15 U.S.C. §78bb(a)] renders the existing common law, which imposes liability for all conduct in *furtherance* of the unlawful recommendation —regardless of knowledge of such conduct—applicable; *Nye & Nissen* v. *United States*, 336 U.S. 613, 69 S.Ct. 766, 770 (1949); *Int. Brotherhood of Electrical Workers* v. *N.L.R.B.*, 181 F. 2d. 34, 38, 39 (2 Cir., 1950); A.L.I., Rest. of Law, Torts, Vol. 4, §876 and comment 7 thereof; Cooley on Torts, 4 ed., Vol. 1, §§75 and 85.

[3] Payment, of course, constitutes an affirmative defense placing the burden of proof thereon upon respondents both under state and federal law. With respect to a complicated [R. 163] accounting, state law imposes upon the pledgee the burden of proof to account; *Pierce* v. *Life Assur. Soc.*, 145 Mass. 56, 60, 12 N.E. 858, 862; *Little* v. *Phipps*, 208 Mass. 334, 335, 94 N.E. 260, 262; *Milbank* v. *J. C. Littlefield, Inc.*, 310 Mass. 55, 36 N.E. 2d. 833; and no finding was even made as to whom respondents delivered the securities, conceded to have been received by them; 600 and 2100 share blocks of American Motors, 100 shares of Jones Laughlin Steel Corp. See Petition for Certiorari, pp. 28, 29.

C.P. and consequently carry no weight. Thus, a fortiori, they are subject to review. The trial court, for example, made no findings as to (1) respondents' knowledge of facts alerting them to Homsey's wrongdoings, (2) their disposition of petitioner's securities conceded to have been received by them as collateral, (3) their good faith, qua pledgees, in receiving securities registered in the name of the petitioner as collateral for their loans to Homsey, (4) the negotiability of the latter securities. And no findings of facts were made by the trial court to support its conclusion that respondents properly accounted to the petitioner. Nor were there facts found, as required by the Rule, *Kweskin* v. *Finklestein*, 223 F. 2d. 677, 678, 679 (7 Cir., 1955), to support the trial court's conclusion, adopted by the Circuit Court, that petitioner had failed to sustain the burden of proof of showing that a fraudulent scheme had been inflicted upon her.

4. Respondents Have Erroneously Characterized the Opinions of the Courts Below

Contrary to the assertion of respondents, the Circuit Court neither explicitly, nor implicitly, ruled "that the respondents did not violate the Securities Exchange Act" (p. 8); the Circuit Court assumed exactly the contrary, (Opinion, p. 8). And the Circuit Court did not hold, as respondents state, that "Since they were not brokers they could not violate Regulation T" but assumed that "defendants' recommendation that Homsey follow such a course of action [were] (was a) violation[s] of restrictions upon broker participation in such a transaction as this."[4] (Opinion, p. 8).

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[4] It is of note that the Board of Governors of the Federal Reserve System (Federal Reserve Bulletin 950 (1933)) has stated that anyone participating in a violation of Regulation T may be guilty; cf, 2

Neither did the Circuit Court "readily accept" that petitioner and her broker "were engaged in a joint venture" (p. 9). Although the district court drew such a *conclusion,* the Circuit Court, in response to petitioner's arguments—that (1) the terms of the agreement did not constitute a joint venture under either state or federal law, (2) and any such "joint venture" was void or voidable by virtue of the broker's material omissions (R. 380, 381) and (3) that the existence of any such possible "joint venture" was immaterial as it was specifically proscribed by Regulation T and could not, in any event, constitute grounds for an estoppel [5]—refused to make reference to a "joint venture." [6]

And also contrary to the suggestion of respondents, the courts below were not in agreement in determining the legal consequences ensuing from the conduct of a party who "merely" (Opinion, p. 8) *causes* a broker to arrange *illegally* a "non-regulated" purpose loan for a customer

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Loss, Securities Regulations, 2d Ed. 1961, p. 1263. And this Court only a few months ago in *U. S.* v. *Price*, 86 S. Ct. 1152, 1156, 1157 (1966) has ruled that conduct prohibited by statute renders a person liable thereunder who is not within the class of individuals encompassed by the statute if "he is a wilful participant in joint activity" with an individual whose conduct is proscribed under the statute or if he "took advantage of participation" of such latter individual. See also, *United States* v. *Lester*, 363 F. 2d. 68, 72, 73 (6 Cir., 1966) and 1951 U.S. Code Cong. Service, pp. 2578, 2583.

[5] *Sola Electric Co.* v. *Jefferson*, 317 U.S. 173, 63 S. Ct. 172 (1942); *Kaizer-Frazer Corp.* v. *Otis & Co.*, 195 F. 2d. 838, 843 (2 Cir., 1952); *Remar* v. *Clayton Securities Corp., et al.*, 81 F. Supp. 1014, 1017 (D. Mass., 1949); *Reader* v. *Hirsch*, 197 F. Supp. 111 (S.D.N.Y., 1961).

[6] Referring to the American Petrofina transaction, the Circuit Court said: "—Moreover, on one occasion she had borrowed money to finance the purchase of stock in a profitable [?] venture in association with Homsey." (Opinion, p. 2). This hardly supports respondents' statement that the Circuit Court ruled that the petitioner was engaged in a "joint venture" with respect to the American Motors transaction.

of the broker. The district court ruled that such conduct had the effect of rendering respondents, *civilly* liable [denial of respondents' Motion to Dismiss #1 (2) (R. 14, 15)] and relied upon Remar v. Clayton Securities (supra) therefor. But unlike the Circuit Court, which assumed that respondents' recommendation to the broker constituted an aiding and abetting and which further assumed that such conduct had the effect of rendering respondents liable *criminally* or subject to administrative disciplinary sanctions, the district court refused to rule that such recommendation constituted an aiding and abetting of the broker's offense. The Circuit Court refused to rule that grounds for *civil* as opposed to *criminal* liability existed in light of its ruling that the *extension* of the loan itself was legal. Thus, it disregarded the language of Regulation T, which condemns participation in the *arranging* of *any* purpose loan (regardless of the source of the funds) on terms other than the participating broker himself could legally extend.

No authority was cited, nor was any justification offered for the Court's suggestion that Regulation T should be solely enforced "through the various administrative disciplinary sanctions provided by the Act, or by injunctive relief or even criminal sanctions—" (Opinion, p. 8) to the exclusion of private action and, to the contrary, the right of a private person to seek relief has been upheld even where the Securities and Exchange Commission had *already* exercised jurisdiction over the same civil matter; *Securities and Exchange Commission* v. *Long Island Lighting Co.*, 148 F. 2d. 252, 257 (2 Cir., 1945). Moreover, no reason was offered why the possibility of administrative enforcement should any more preclude private relief in a case involving a "non-regulated" loan than in one involving a "regulated" loan or why an "aider and abettor"

to a violation of the margin provisions should enjoy an immunity to civil action not available to a direct violator.[7]

5. The Position of the Board of Governors of the Federal Reserve System Does Not Support Respondents' Contentions

Respondents urge that the claimed inaction of the Board supports their position that a private money lender cannot directly or indirectly violate Regulation T.

But as has already been pointed out the unanswerable fact is that the Board has stated that any one who aids and abets a violation of Regulation T stands on the same footing as a direct violator thereof.

And failure of the Board to have elucidated the *statutory* meaning of the term "broker" or to have decided whether a lender not specifically mentioned by the regulations may be encompassed by the *Act itself* (see Petition for Writ of Certiorari, p. 24, footnote 28) does not support respondents' position. *F.T.C.* v. *Dean Foods Company*, 86 S. Ct. 1738, 1746 (1966).

Conclusion

In view of the reasons set forth in the Petition for a Writ for Certiorari and the additional grounds set forth herein, it is respectfully submitted that the writ should issue.

Respectfully submitted,

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[7] *Int. Brotherhood of Electric Workers* v. *N.L.R.B.*, (supra) and authorities et seq. cited in footnote 2.